156

CLERK'S COPY

Volume 7

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 29

FEDERAL TRADE COMMISSION, PETITIONER

vs.

THE CEMENT INSTITUTE, et al.

No. 30

FEDERAL TRADE COMMISSION, PETITIONER

vs.

SUPERIOR PORTLAND CEMENT COMPANY

No. 36

FEDERAL TRADE COMMISSION, PETITIONER

vs.

AETNA PORTLAND CEMENT COMPANY, et al.

No. 37

FEDERAL TRADE COMMISSION, PETITIONER

vs.

RIVERSIDE CEMENT COMPANY

No. 38

FEDERAL TRADE COMMISSION, PETITIONER

vs.

MARQUETTE CEMENT MANUFACTURING COMPANY

No. 39

FEDERAL TRADE COMMISSION, PETITIONER

vs.

UNIVERSAL ATLAS CEMENT COMPANY

No. 40

FEDERAL TRADE COMMISSION, PETITIONER

vs.

CALAVERAS CEMENT COMPANY, et al.

No. 41

FEDERAL TRADE COMMISSION, PETITIONER

vs.

CALIFORNIA PORTLAND CEMENT COMPANY

No. 42

FEDERAL TRADE COMMISSION, PETITIONER

vs.

HURON PORTLAND CEMENT COMPANY

No. 43

FEDERAL TRADE COMMISSION, PETITIONER

vs.

PENINSULAR PORTLAND CEMENT COMPANY, et al.

No. 44

FEDERAL TRADE COMMISSION, PETITIONER

vs.

SUPERIOR PORTLAND CEMENT, INC.

No. 45

FEDERAL TRADE COMMISSION, PETITIONER

vs.

ALPHA E. BOYTE, et al.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 20, 1947
CERTIORARI GRANTED MARCH 10, 1947

INDEX TO VOLUME 7.

Pages 4343 to 5145.

TRANSCRIPT OF TESTIMONY.

Colloquy 5046, 5071, 5088, 5112
Offer of Exhibits 5044, 5074

WITNESSES FOR COMMISSION (CONTINUED).

Testimony of:
Affleck, B. F. 4553
n, W. S. 5016
John H. 4671
is, J. B. 4430, 4465
, L. J. 4442
ichael, Eugene 4708
Harold S. 4410
rite, A. C. 4701
y, Dr. Edward A. 5122
r, James 4696
r, Bernard 5033
Hartley, E. E. 4474
Henderlite, H. B. 4792
Hill, E. D. 4620
Horner, Charles 4371
Le Haney, J. A. 5022, 5044
Miller, Howard 4654, 4696
Morris, Eugene 4516
McClain, Baxter D. 5003
McClendon, Y. E. 4833

McIntyre, Everette 5052, 5080, 5099
McKeag, James 4669
Rader, B. H. 4523
Reagel, F. V. 4784
Rohwer, O. H. D. 4612, 4651
Royal, I. D. 4343, 4398, 4491, 4522
Scovel, J. D. 4576
Sunderland, L. T. 4716, 5000
Thornhill, L. L. 4894
Tyler, F. E. 4949
Varady, Daniel J. 4390
Ward, Maurice Vernon 5043
Warner, H. O. 4803
Wecker, W. A. 4845
White, Hugh E. 5120
Wood, E. E. 4994

(Testimony of Witnesses contained in pages 12318 to 15352 of the Original Transcript.)

12318 Chicago, Illinois,
December 13, 1938.

12325 I. D. ROYAL was thereupon recalled as a witness for the Commission and, having been previously duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

Q. Mr. Royal, I believe you have appeared in this proceeding before as a witness?

A. I did.

Q. And I believe it appears from your previous testimony that you are an employee of the Federal Trade Commission?

A. That is right.

Q. And the nature of your employment, I think also appears, if I am not mistaken?

A. I think so.

Q. How many investigations of the cement industry have you engaged in since your connection with the Federal Trade Commission?

Mr. Leisure: May we have the dates there? I am not clear whether that has been shown or not.

Mr. Wooden: I don't think it has.

A. I have taken part in three of them.

By Mr. Wooden:

Q. Will you describe what the three were and the dates that you engaged on those three investigations?

12326 A. The first was in 1931 and 1932, made pursuant to a Senate resolution. The second investigation was made in 1933 and was in connection with the bids made by cement companies to the Highway Departments of Indiana, Illinois and Iowa. The last investigation was in 1936, and had to do with a—well, it had to do with the question that is of vital concern here, the question regarding basing points, as I understand it.

Q. In the course of either of those three investigations, did you have occasion to call upon the Universal-Atlas Company at Chicago?

A. Yes, I called on Mr. F. L. Stone, vice president of the Universal-Atlas Company on May 24th and 25th, and June 12th of 1933—

Q. And what was the—

A. (continuing.) —to secure information regarding the bids of that company to the Highway Departments of Indiana, Illinois and Iowa.

Q. Will you state in a general way what you did in the office of the Universal-Atlas Company on that occasion?

A. It had appeared from investigations made at the offices of the Highway Commissions of these States that bid prices—

Mr. Leisure: I object to what it had appeared. The witness can tell us what he did.

The Witness: Then I will make it in the form of
12327 a flat statement. Bid prices were higher in 1933 than in 1931 and '32.

12328 Q. Mr. Royal, what led you to go to the office of the Universal-Atlas Company on that occasion?

A. I went there, as I stated, to get information relative to the high bids.

By Mr. Wooden:

Q. What did you do there?

12329 A. I asked Mr. Stone why prices were higher in 1933 than in 1931 and '32.

Q. And what did he say?

A. Mr. Stone said that prices had been lower in
12330 previous years, and that there had been a price war —there had been a price war which began in November of 1930 and the prices that existed up to the end of 1932 were ruination prices, and that this accounted for the higher prices in 1933.

By Mr. Wooden:

Q. Did you ask—

Mr. Leisure: Mr. Wooden, the witness has stated he made three visits and you have asked him to tell about the visits. I don't think it is shown on the record which visit he is now talking about.

By Mr. Wooden:

Q. Will you clear that up, Mr. Royal?

A. This relates to the first one. I am taking them more or less in chronological order.

Q. The first one, when was that, May, 1933?

A. May 24th, 1933.

Q. Did you ask Mr. Stone to supply you with any records or figures from the files of his company?

A. I did later, but Mr. Stone offered at that time to supply me with a statement of the mill net prices that had prevailed at Buffington and Hannibal since November, 1930 down to approximately the date of the interview. This he did.

Q. I am showing you a paper marked Commission's Exhibit 1954, for identification. Can you tell me what that is? (Handing document to witness.)

12331 This is a tabulation.

Q. Mr. Royal, will you examine the paper and say where you have seen it before and where it came from, if you know?

12332 A. This is a statement prepared and furnished me in response to a request I made of Mr. Stone at my first call upon him in May—on May 24th, 1933.

Q. Was that furnished you by Mr. Stone?

A. It was prepared under his direction at my request and turned over to me a day or so later. I am not sure whether he handed it to me personally or not.

Q. Is that the original paper?

A. This is the original, yes, sir.

Q. That was handed to you?

A. (No response.)

Q. Did you ask for some definite information to which that was furnished in response?

A. I asked for information as to the number of barrels of cement that had been shipped from Buffington and Hannibal for 1931, 1932, the first four months of 1933, together with the mill net realized per barrel.

Q. And is that the paper you received in response to that request for the mill net?

A. It is.

Q. Was there any condition of confidence imposed by Mr. Stone or any one of the Universal-Atlas in providing you with this information?

A. Oh, no, it was furnished me for the purposes of the investigation.

12333 Mr. Wooden: I will offer that paper in evidence.

Trial Examiner Norwood: Let me see it.

(The exhibit referred to was handed to the Trial Examiner.)

Mr. Wooden: Give this the next number, please.

(The letter above referred to was thereupon marked for identification as Commission's Exhibit 2149.)

Mr. Wooden: I should like to say that I wish to exclude from the offer the portion which deals with administrative and selling expenses per barrel.

Trial Examiner Norwood: On the record.

Any objection to the proffer?

Mr. Leisure: May I ask the witness a question about it?

Trial Examiner Norwood: Certainly.

Examination on Voir Dire by Mr. Leisure.

Q. Do you recall, Mr. Royal, what you asked Mr. Stone for when you got this exhibit?

12334 A. I asked him for a statement of the number of barrels shipped in each of those periods with the net mill realized on a per barrel basis from Hannibal and Buffington mills of the Universal-Atlas Company.

Q. You asked him to make that up for you, you asked him to make that up for you in tabular form?

A. Yes. He called Mr. Lindahl in and requested him to make it up.

Trial Examiner Norwood: Any objections?

Mr. Leisure: We have no objection.

(COM. EX. 1954 was offered and received in evidence.)

Direct Examination (Resumed) by Mr. Wooden.

Q. Now, Mr. Royal, I am showing you a paper marked "Commission's Exhibit 2149" for identification. Can you state where that came from and where you have seen it before?

A. I asked the Universal-Atlas Company to prepare a tabulation that was, in fact, an elaboration of the tabulation that just was introduced in evidence, showing the number of barrels shipped, the net sales value, and the total cost of cement sold, and the net profit or loss for each of those two plants for the same periods, and

12335 then a statement showing the number of barrels shipped and total profit or loss from all of the plants belonging to the company.

Trial Examiner Norwood: From whom did you ask this paper?

The Witness: I prepared a list of those questions, and it is my recollection that about the time I got this first state-

ment, which was just before introduced into evidence, I presented this paper in the nature of a questionnaire to either Mr. Lindahl or Mr. Greenley. This was after the interview of Mr. Stone.

Trial Examiner Norwood: You presented it to a representative of this company?

The Witness: Yes.

Mr. Wooden: Who was this?

Trial Examiner Norwood: Your motion is denied.

Mr. Leisure: I don't think there should be a se-
12336 cret about who the representative was. We are entitled to know.

Trial Examiner Norwood: It will come out.

The Witness: There is no secret. To the best of my recollection; it was either Mr. Lindahl or Mr. Greenley, and Mr. Stone was at that time out of the city.

By Mr. Wooden:

Q. Who was Mr. Greenley?

A. He was Mr. Stone's assistant, as I understood it.

Q. Who is Mr. Lindahl?

A. I beg your pardon?

Q. Who is Mr. Lindahl?

A. Mr. Lindahl was auditor and assistant secretary, I believe.

Q. As I understand it, this paper marked 2149, Commission's Exhibit, was received by you from one of those gentlemen in response to inquiry or request that you have just described?

A. That is right.

Mr. Wooden: I am not offering it at this time, your Honor, Commission's Exhibit 2149.

By Mr. Wooden:

Q. Did you make any inquiry of Mr. Stone with reference to the method employed in submitting bids on the State Highway business in 1932 and '33?

A. Yes.

12337 Q. Will you state what he told you in that connection?

A. I asked Mr. Stone why the company refused to submit bids on an F. O. B. mill basis, and he replied that that would not work, and that it was the Universal custom to submit bids on an F. O. B. destination basis, that that had been the custom for a good many years.

Q. Did you ask him any further questions on that subject as to the reason for the policy of quoting F. O. B. destination prices instead of F. O. B. mill?

A. We discussed the matter further and he said that quoting prices on an F. O. B. mill basis would set up a zone around each mill, the extent of the zone being determined by the area within which the mill had a freight advantage, and that this would effectually shut off bidding in the territory by any other mill, but he said that a mill would find it absolutely necessary to reach out further for business than the zone within which the F. O. B. mill basis would confine them. He said that a crop failure or some other catastrophe would really force them to reach out further. And he said that in—when they reached out further with the idea of absorbing some of the freight charges, they would get into the territory of another mill which had the natural advantage in that zone, and the result would be that that mill would reduce its net mill price

12338 in order to compete, and the situation would resolve itself into an F. O. B. destination proposition again.

Q. Did you ask him any questions with regard to the relation of destination prices to identical or uniform destination prices?

A. Will you repeat that question?

(Question read.)

Mr. Wooden: Make it "identity or uniformity of destination prices."

A. I don't think I quite understand what you refer to there.

By Mr. Wooden:

Q. I will try again. Did you ask Mr. Stone any questions as to whether quoting on an F. O. B. destination basis was or was not essential in any program of uniform destination prices?

A. I understand your question now.

12339 The Witness: I asked Mr. Stone whether in a program of uniform mill prices among all the cement companies the policy of quoting prices F. O. B. destination was essential. He replied that there might be other ways in which this could be maintained but he didn't know of any.

12341 Mr. Leisure: Now, I object to the witness explaining what Mr. Stone meant. I object to that question.

Trial Examiner Norwood: What did he say? Objection

overruled. You are not to say what Mr. Stone meant, but what he said.

The Witness: I didn't attempt to say what—

Mr. Leisure: He has already said what he stated.

A. I didn't attempt to say what Mr. Stone meant. I can only repeat what he said. He said that there might be other ways that such a program could be maintained, but he didn't know of any.

By Mr. Wooden:

Q. Will you state whether or not you obtained
12342 from Mr. Stone in 1933 figures that showed how the Universal-Atlas bids on state business were made up?

A. Yes. I requested Mr. Stone for tabulations showing details of the bids his company had made to the state highway departments of the three states since the last bid in 1931 and down to the most recent bid before the interview.

Q. Were any such tabulations furnished you?

A. There were.

Q. Can you say by whom?

A. Those tabulations were furnished me by Mr. Stone, I believe; at least, he requested that they be made up and they were furnished me by either Mr. Stone or his assistant, Mr. Greenley.

The witness identified Com. Ex. 2150 A and B as one of the tabulations supplied to the witness by Mr.
12343 Stone, which shows the bids of Universal Atlas to the State of Illinois on January 6, 1932.

12343 Mr. Wooden: I offer this in evidence, Your Honor, Exhibit 2150-A and B.

Trial Examiner Norwood: Any objections?

Mr. Leisure: No objection.

(COM. EX. 2150-A and B was offered and received in evidence.)

Q. I am showing you a paper marked Exhibit 2151-A and B, for identification. Can you state where that
12344 came from and where you have seen it before?

(Handing document to witness.)

A. This is a tabulation given to me by either Mr. Stone or his assistant, showing the bids of the Universal-Atlas Company to the State of Illinois for the letting of February 3rd, 1932.

Q. Does that paper show how the Universal-Atlas bids were made up on that bidding?

A. It shows the details of the make-up of the bids.

Trial Examiner Norwood: Do you offer it?

Mr. Wooden: I will offer Exhibit 2151-A and B in evidence.

Trial Examiner Norwood: Any objection?

Mr. Leisure: No objection.

(COM. EX. 2151-A and B was offered and received in evidence.)

Q. Did you make any inquiry of Mr. Stone with regard to the method employed, particularly on this bidding of February 3rd, 1932, represented by Exhibit 2151-A and B?

A. Might I see that again, please?

Q. Yes.

12345 (Handing document to witness.)

A. The absence of the base and base price and freight per barrel from base to the destination came to my attention as I examined it, and I inquired about this. It was explained to me that—

Q. By whom?

A. By either Mr. Stone or Mr. Greenley, I have forgotten which one, but it was explained to me that they used no basing point in making these prices, but simply reduced the price compared with the January bids to a price that would give them a mill net of 70 cents a barrel.

Q. Was that a mill net of 70 cents no matter what destination was involved?

A. Regardless of destination.

Mr. Leisure: Mr. Wooden, I am trying to follow the witness' testimony. What was the date of the conversation he has just described?

Mr. Wooden: May, I believe, 1933.

Mr. Leisure: He is still on the first visit?

Mr. Wooden: That is in May.

12346 Mr. Leisure: May, 1933, is that correct?

The Witness: I didn't get the question.

Mr. Leisure: I am trying to follow your testimony and I am not sure whether the date has been fixed as to when you are talking about.

The Witness: That was May 24th or 25th.

Mr. Leisure: 1933?

The Witness: 1933.

By Mr. Wooden:

Q. Will you tell us where the papers marked Commission's Exhibit 2152-A and B, for identification, came from?

(Handing document to witness.)

A. This is a tabulation furnished to me by either Mr. Stone or Mr. Greenley of the Universal-Atlas Cement Company, when I asked for a statement of their bids, to Illinois, on February 20th, 1933.

Mr. Wooden: I offer Exhibit 2152-A and B.

Trial Examiner Norwood: Any objection?

Mr. Leisure: No objection.

(COM. EX. 2152-A and B was offered and received in evidence.)

12347 Q. What is Exhibit 2153-A and B, for identification, please?

(Handing document to witness.)

A. This is a tabulation handed to me by either Mr. Stone or Mr. Greenley of the Universal-Atlas Cement Company in response to my request for details of the company's bids to the Indiana Highway Commission for the letting of January 21st, 1932.

It came to my attention that no base point or base price was used in connection with this bid. This was inquired about, and I was informed that they disregarded basing points and base prices and simply reduced their last previous bid to an amount that would net the mill 65 cents for any and all destinations.

Q. By whom were you given such information?

12348 A. By either Mr. Stone or Mr. Greenley.

Mr. Wooden: I will offer Commission's Exhibit 2153-A and B.

Trial Examiner Norwood: Any objection?

Mr. Leisure: No objection.

(COM. EX. 2153-A and B was offered and received in evidence.)

Q. What are the papers marked Exhibit 2154-A and B, for identification?

(Handing document to witness.)

A. This is a tabulation of details of the bids to the Indiana State Highway Commission for the letting of December 22nd, 1932, supplied to me as the bids of the Universal-Atlas Cement Company by Mr. Stone or Mr. Greenley.

Mr. Wooden: I will offer those papers in evidence.

Mr. Leisure: No objection.

12349 (COM. EX. 2154-A and B was offered and received in evidence.).

Q. What are the papers marked Exhibit 2155-A and B, for identification?

(Handing document to witness.)

A. "A" is a tabulation of the details of the Universal-Atlas Cement Company bids to the Iowa State Highway Commission for the letting of November 24th, 1931, and Exhibit "B" is a tabulation of the bids of the Cement Company to the Iowa Highway Commission for the letting of August 16th, 1932. Both were supplied to me by Mr. Stone or Mr. Greenley of the Universal-Atlas Company.

12350 Mr. Wooden: I offer those in evidence.

Trial Examiner Norwood: Any objection?

Mr. Leisure: No objection.

(COM. EX. 2155-A and B was offered and received in evidence.)

Q. Mr. Royal, referring to these various exhibits which you have just identified, namely, 2150-A and B, 2151-A and B, 2152-A and B, 2153-A and B, and 2154-A and B, did you ascertain in your inquiries what the abbreviations referred to under the column headed, "Base and Base Price" were?

A. Yes, I know the meaning of those abbreviations.

Q. What were the abbreviations? What did they stand for?

A. Hannibal, St. Louis, LaSalle, Sugar Creek, LaSalle, St. Louis, Limedale, Buffington, Mitchell.

Q. You are now looking—

A. Cape Girardeau.

Q. What number is the paper you are looking at now?

A. I am looking at the Exhibit 2150-A.

Q. Any other abbreviations appear on those other papers that you can see?

A. I believe that covers them all.

Q. "C. G." Is that Cape Girardeau?

12351 A. Cape Girardeau. I think they are all covered.

Q. Looking at 2155-A and B, can you say what the abbreviations there under the head of "Base and Base Price" mean?

A. Sugar Creek, Mason City, Sugar Creek, Mason City.

Q. "S. C." for Sugar Creek?

A. "S. C." is Sugar Creek. "M. C." is Mason City. "Han" is Hannibal. "LaS." is LaSalle.

Q. What is the paper I now show you marked as 2156, for identification?

A This was a statement, a tabulation showing basing points and the base prices, and covers all changes made in base prices from July 1, 1931, to May 24, 1933.

Q. Where did the paper come from?

A. This was given to me by Mr. F. L. Stone of the Universal-Atlas Cement Company.

Trial Examiner Norwood: That relates to prices of what companies?

The Witness: It relates to the basing point prices. That means any—

Trial Examiner Norwood: Throughout the country?

12352 The Witness: Throughout the country.

Mr. Wooden: Certain parts of the country. You wouldn't say it is the whole country.

Trial Examiner Norwood: Throughout the country covered by the statements there, I suppose.

The Witness: Throughout the country, you might say, west of Ohio and Michigan.

Mr. Leisure: That is, it shows what the Universal-Atlas Company uses? Is that the way it is headed, Mr. Witness?

The Witness: No, it is intended to show the prices at those basing points which were presumably used by all companies.

By Mr. Wooden:

Q. Was the paper furnished you in response to a request that you made for such a statement?

A. It is.

Mr. Wooden: I will offer it in evidence.

Trial Examiner Norwood: You asked them for the prices that generally prevailed and not just for the prices charged by this particular company; is that right?

The Witness: I asked for the base prices that prevailed during that period at the various basing points used in the west.

12353 Trial Examiner Norwood: Any objections?

Mr. Leisure: May I ask the witness when he got this?

Trial Examiner Norwood: Certainly.

Examination on Voir Dire by Mr. Leisure.

Q. Perhaps you told us, Mr. Royal, but I don't recall. Was it the last investigation that you were working on when you obtained this Commission's Exhibit 2156, or was it the one before that?

A. It was in 1933.

Q. 1933. Was it the one in which you were inquiring about the bids in Indiana, Illinois?

A. That is true.

Mr. Leisure: We object to the exhibits, Your Honor, as having no probative value, incompetent, irrelevant, and immaterial. There is no showing it was ever used for any purpose whatever. It does not prove or tend to prove any of the issues raised by these pleadings, not binding on any of the respondents.

12354 Trial Examiner Norwood: Any further objection?

Mr. Zimmerman: I would like to ask the witness a question on it, if I may.

Trial Examiner Norwood: Certainly.

Examination on Voir Dire by Mr. Zimmerman.

Q. Do you have any information, Mr. Royal, as to from what this exhibit 2156 was made up, what the sources of it were?

A. Well, I do know, but I didn't see it made up and I didn't see what they made it up from.

Q. Well, the only thing you would know about it would be what somebody told you then?

A. And what I have seen as I have gone around.

Q. Well, that would be your inference from what you have seen as you have gone around.

A. I have seen tabulations of a similar nature in the hands of various cement companies.

Mr. Zimmerman: I don't think there is anything more.

(COM. EX. 2156 was offered and received in evidence.)

By Mr. Wooden:

12355 Q. Directing your attention to the figure of "2.01" for Steelton, Minnesota, under the column headed "July 1, 1931", in this Exhibit 2156, did you have any conversation with Mr. Stone regarding that Steelton price of that date.

A. I asked Mr. Stone if Steelton was a base.

He told me that it was only a nominal base, and had been used as a nominal base for the period of about a year, but that the base price established at Mason City controlled in Duluth and northern Minnesota.

He said that the Steelton gross base price of $2.01 per barrel was not used even as a nominal base if the base price of Mason City got down to $1.50.

He also said that it was to the advantage of the Universal-Atlas Company's Steelton mill for the Mason City base price to control in northern Minnesota.

Q. Did he say why?

A. It enabled them to get a higher mill net than if they had used the Steelton base.

Q. Was there any other case touched on in your conversation with Mr. Stone of a similar case of a nominal base anywhere?

A. Well, he said they had tried to make Buffington a base, but—

Q. During what time?

During the year 1931, in fact, throughout that
12356 whole year, but they were unable to get it generally used as a base, particularly after the reduction in price was made at LaSalle.

Q. What concerns at LaSalle?

A. How is that?

Q. What concerns at LaSalle,—did you ask him that?

Mr. Leisure: Your honor, we are still having this method of examination. I think the witness ought to have to tell us what was said.

Trial Examiner Norwood: I think that is what he is doing, just exactly.

Mr. Leisure: He is really questioning the witness as to what he may have said.

Trial Examiner Norwood: Read the last question, please.

(Question read.)

Trial Examiner Norwood: The objection is overruled.

A. I am not sure whether I did ask him that or not.

By Mr. Wooden:

Q. Did you ascertain whether or not LaSalle controlled the Chicago delivered price instead of Buffington during that period?

Mr. Leisure: Now, I object to that "did you ascertain."

The witness can be asked whether or not he saw
12357 any representative of the Universal-Atlas Company, and if he did, what he said to the representative and what the representative said to him.

Trial Examiner Norwood: He may lay the grounds by showing how he got the information and then he can tell us what the information was.

Mr. Wooden: I should change the word "ascertain" to "ask".

Now, will you read the question?

(The question referred to, as revised, was read by the reporter as follows: "Question: Did you ask whether or not LaSalle controlled the Chicago delivered price instead of Buffington during that period?")

A. That question was asked of Mr. Stone, after his statements concerning his attempts to establish a Buffington base and maintain it, the question was asked him whether Buffington or LaSalle controlled the price in Chicago, and he stated that the LaSalle base controlled the price in Chicago.

By Mr. Wooden:

Q. At what time?

A. Well, that was in 1931 and I think part of 1932.

Q. Did you have any conversation with Mr. Stone on the subject of whether he would accept the Illinois
12358 business at a lower price, if he were able to get the whole of it?

Mr. Leisure: The same objection, leading. He isn't asking the witness what conversation was had.

Trial Examiner Norwood: Read the question, please.

(Question read.)

Trial Examiner Norwood: Objection overruled. Answer that yes or no.

A. I did.

By Mr. Wooden:

Q. Will you state the substance of your conversation with him, both sides, on that subject?

A. In a general discussion of prices, in connection with the prices,—

Mr. Leisure: Now, just a moment. I object to the witness stating substances of conversations. He can state what he said and what was said to him. I object to his stating "in a general discussion." That is not reliable testimony and we should have it made reliable. We should have what was said by the witnesses themselves.

12359 Trial Examiner Norwood: Objection overruled.

I shall ask you to give the exact language where you can, and if you can't recall that, and you are positive as to the substance of what he said, you may give that.

A. I was coming to the exact question. In a general conversation I had with him in regard to prices bid at these highway lettings, I asked him if they would have accepted a lower price than what was then considered market price had the State of Illinois offered them a contract for 3,300,000 barrels of cement.

Mr. Leisure: Now, your Honor, I submit as to what they would have done, we are getting into the field of conjecture not material to any of the issues in this case. Mr. Stone, if that is who he was talking to, and it isn't clear so far who he is talking to—that would not even be binding on his own company, and I object to it.

Trial Examiner Norwood: Objection overruled. Finish your answer.

A. Mr. Stone replied that he would not have taken a contract from the State of Illinois for 3,300,000 barrels of cement which meant—rather, at any reduction in the

12360 then market price because it would demoralize the market too much, and the maintenance of, or the stabilization, rather, of the price was worth more than securing a contract for 3,300,000 barrels of cement.

By Mr. Wooden:

Q. Did Mr. Stone express to you any criticism of the form or basis in which the State requirements were asked for in the bids?

A. Mr. Stone said that the contract contained in the invitation to bid by the State of Illinois was really only an option contract wherein the State, if it awarded the contract, agreed not to take a definite amount, but might take the full amount of the contract and might take a great deal less. He said it worked a hardship on cement companies because it was not definite and certain and did not enable them to manufacture a quantity to meet a specific quantity ordered.

12361 Q. Will you state whether or not you asked Mr. Stone anything with regard to telephone conversations with competitors?

A. I asked him whether when he knew of a price raise by competitors he had any one in his office contact by telephone the competing company to confirm the raise that was reported in price. Mr. Stone replied that this was sometimes done but that it was not the usual course of procedure; that they usually secured through dealers and salesmen full confirmation of any reported change in prices.

Q. Did you make any inquiry of Mr. Stone with reference to the method of calculating the freight rate within the Chicago territory or the Chicago district?

A. I did.

Q. Will you state what you asked him and what he told you?

A. I asked Mr. Stone if it was true that the Universal-Atlas Cement Company had any part in the control of the E. J. & E. That is, the E. J. & E. Railroad, and whether it made a preferential freight charge on cement business shipped from Buffington to Chicago and Cook County, Illinois. Mr. Stone replied that the United States Steel Corporation controlled the E. J. & E., but they made it a practice to use an arbitrary freight rate between

12362 Buffington and points in Cook County. The freight rate from Buffington to various points in Cook County varied from 25 cents to 39 cents a barrel, but they used 25 cents as an arbitrary freight charge to all points in the county, many of which were within the switching limits of Chicago.

Q. Did you inquire as to what were the switching limits of Chicago?

A. Well, I understood that the switching limits in Chicage included a territory—

Mr. Leisure: Just a moment. Just a moment. If the witness means by he understood that Mr. Stone explained to him and he didn't know before he went there what the switching limits were, that is one thing, but—

Mr. Wooden: That is what I seek to ascertain.

Trial Examiner Norwood: Did you attempt to find out what the switching limits were?

A. Mr. Stone stated to me that the rates prevailed in Cook County and included part of Gary, Indiana.

By Mr. Wooden:

Q. Now, Mr. Royal, did you ever in your cement investigational work call at the offices of the Lehigh Portland Cement Company?

A. Yes.

Q. Will you state where and when?

12363 A. I called on the Lehigh Portland Cement Company's Chicago office during June of 1933 several times. I was unsuccessful in seeing Mr. Rader, who was vice-president and Western sales manager, but eventually found him in the office, and he was then engaged in assisting in writing the NRA Code for the industry.

At that time, in pursuance to my request, he gave instructions to an assistant, Mr. Hughes, I think the name was, to prepare tabulations of the company's bids in Indiana, Illinois, Iowa, on highway cement.

Q. Did you state when you were there?

A. Pardon?

Q. Did you state when you were there?

A. In June of 1933.

Q. Was your visit there in connection with the highway bidding investigation?

A. Yes.

12364 Q. I am showing you papers marked 2157-A to D, for identification. Can you tell us where those papers came from?

(Handing documents to witness.)

A. This comprises a tabulation that was supplied to me by Mr. B. H. Rader of the Lehigh Portland Cement Company in June of 1933, showing the details of the Lehigh Company's bids to Indiana, January 21, 1932.

Mr. Wooden: I offer those papers in evidence.

Trial Examiner Norwood: Any objection?

Mr. Leisure: May I ask the witness a question about this exhibit?

Trial Examiner Norwood: Certainly.

By Mr. Leisure:

Q. So that I may understand this, Mr. Royal, do I understand that when you saw Mr. Rader you asked him about the price bid and how it was made up,—is that the way the tabulation was secured?

A. Well, I asked him to give those details of their bids.

Mr. Leisure: Yes. No objection.

(COM. EX. 2157-A to D, both inclusive, was offered and received in evidence.)

12365 By Mr. Wooden:

Q. I note here, Mr. Royal that this exhibit apparently contains—strike that, please.

Was there any basing point shown in that compilation?

Mr. Leisure: Now, your honor, the exhibit speaks for itself.

Trial Examiner Norwood: I think so.

Mr. Leisure: And it has been received in evidence.

Trial Examiner Norwood: I think so. Objection sustained.

By Mr. Wooden:

Q. I will ask you whether you had any conversation with Mr. Rader about that compilation.

A. If I had the bids to the various states in my possession, perhaps I could answer that question.

Q. What are the papers I now show you, Mr.
12366 Royal, marked for identification as Commission's Exhibits 2158-A to D, 2159-A to E, 2160-A to E, 2161-A to E, and 2162?

(Handing documents to witness.)

A. These are all tabulations prepared under Mr. B. H. Rader's instructions, at my request, and given to me in June of 1933, showing details of bids to the States of Indiana, Illinois and Iowa by the Lehigh Portland Cement Company.

Q. As of the dates shown in the heading, is that correct?

A. As of the dates appearing in each tabulation.

Mr. Wooden: I offer Commission's Exhibits 2158 to 2162, inclusive.

2157, has that been offered?

Trial Examiner Norwood: Yes, 2157 has already been received.

This is Nos. 2158 to 2162. Any objection?

12367 Mr. Leisure: No objection.

Trial Examiner Norwood: Any objection?

Mr. Zimmerman: No.

(COM. EX. 2158-A to D, 2159-A to E, 2160-A to E, 2161-A to E, and 2162 were offered and received in evidence.)

12368 Q. I now ask you, Mr. Royal, whether you have had any conversation with Mr. Rader about this

exhibit, 2157-A, or any of the other papers between 2157 and 2162.

A. In connection with the tabulations that are marked 2158-A and 2161-A, Mr. Rader told me after these were prepared, that there was an error in showing the prices with certain designated bases in the columns headed "Base" in the Indiana tabulation of December 22, 1932, and March 23, 1933, and in the column headed, "Base Including Discount," in the tabulation headed, "Prices Quoted Illinois on February 20, March 27, April 12, 1933." He said he did not want it to appear, as this was not the case, that the prices named were the base prices at basing points named, but that the figures were figures they had set as indicating the basis for the mill nets Oglesby and Mitchell, which are shown in the righthand columns, and they are simply arbitrary amounts put opposite those basing points names to indicate to themselves that they could not go below those figures as a base including discounts.

Q. Was any statement made regarding the other exhibits that you—

12369 Q. —that you have running from 2157 to 2162, inclusive, with the exception of the two that you have just described, 2158 and 2161?

A. Those tabulations were given to me as representing the details of the bid submitted in the states named on the date mentioned on the top of the tabulations.

Q. You don't recall any statement made in explanation of those other than you have already given?

A. In Iowa they did on a bulk basis.

Q. Did you ascertain the meaning of the abbreviations that appear in the various columns headed "Base" and "Base Including Discount"?

A. I have known the meaning of those abbreviations.

Q. Will you state what those abbreviations are and what they mean?

A. Well, in Exhibit 2158-A, the abbreviations are "Buff" for Buffington, "Lim" for Limedale, "Mit" for Mitchell," "Han" for Hannibal.

Q. 2161, is it?

A. In Exhibit 2161-A: "Han" for Hannibal,

12370 "Marq" for Marquette, "Alp" for Alpena; "LS" for LaSalle, "LD"—I don't know what that is. I think that is all of them. Oh, here is—"LD" is a different

way, a different abbreviation for Limedale, apparently.

12371 Q. Are you sure about Alpena?

A. Alpha, according to the legend at the bottom of the exhibit, it means Alpha—St. Louis.

Q. Can you help us with those abbreviations on any of these other papers which you have not already covered?

A. In 2157-A Mit. is Mitchell, Ogl. is Oglesby. In 2159-A Han. is Hannibal, Marq. is Marquette, Ogl. is Oglesby, Alp. is Alpha.

Q. Are the abbreviations explained in the memoranda themselves up through 2161?

A. The abbreviations are explained at the end of several of these documents.

Q. Then in 2162, where, I believe, no explanation appears, do you know what the abbreviations for the basing points there are?

A. In 2162 S. C. is Sugar Creek, M. C. is Mason City, LaS. is LaSalle, Han. is Hannibal.

That is all.

Q. Did you have any conversation with Mr. Rader with regard to the relative costs of selling State Highway Departments and ordinary commercial business?

A. Mr. Rader said the cost of selling State Highway Departments was a great deal less per unit than selling commercially.

Q. Did you have any conversation with Mr. Ra-

12372 der concerning the way in which or the leadership of any increase in price that occurred in 1932?

A. Mr. Rader said that the price increase in 1932, which we discussed, was brought about by the Marquette Company.

By Trial Examiner Norwood:

Q. Did he say how?

A. Not at that time.

By Mr. Wooden:

Q. Did Mr. Rader ever say how at any other time?

A. No, he didn't say how that particular thing was done by that particular company at any time.

Q. Now, in the course of your investigations, did you ever call upon the Dewey Portland Cement Company?

A. Yes.

Q. Will you state where and when?

A. I called on the Dewey Portland Cement Company

in 1933 and also in 1936; in November of 1936 and in May, I think, of 1933.

Q. Whom did you see and where?

A. I saw Mr. L. J. Capen representing the Dewey
12373 Portland Cement Company at Davenport, Iowa.

Q. Who is he?

A. He was sales manager at Davenport. I believe he also had an official position.

Q. Did you see anyone else connected with the Dewey Company at any time?

A. I have interviewed Mr. F. E. Tyler, president of the company, at Kansas City.

Q. Did you ask for access to any files or for any record material from the Dewey Company?

A. Yes, I did.

Q. Will you state what you did, what you asked for?

A. In my calling on them in 1933 I asked for tabulations of the bids they had made to the Highway Commissions of Illinois and Iowa for 1931, 1932 and 1933.

12374 Q. Did you ask for the details as to how they had made up their bid, or what did you ask for?

A. I asked for the bids in a particular—for details of the bid in a particular form and also asked how they were made up.

Q. Do I understand that these tabulations that you got from Universal and from Lehigh were made up especially for you, or did they consist of tabulations that were already in existence? Can you say what that fact is on that?

A. There might have been one one way in some cases and the other way in other cases. I didn't see them prepare it. I requested certain material and it was to be given to me on a certain date and was given to me on a certain date, containing the information asked for.

12375 Q. Showing you papers marked, for identification, as 2163-A to D, 2164-A to D, 2165-A to D, 2166-A to D, 2167-A to D, 2168 and 2169, can you tell us where those papers came from?

A. They came from Mr. L. J. Capen, in charge of the Dewey Portland Cement Company's office in Davenport, Iowa.

Q. Were those papers provided you in response to your request as you have described it?

A. They were.

Mr. Wooden: I offer those papers in evidence.

12380 Trial Examiner Norwood: Suppose we dispose of exhibits that are proffered here, and we may then later excuse him.

State your objections to the proffers that are

12381 pending.

Mr. Leisure: We have no objection.

Mr. Zimmerman: I have nothing to add.

(COM. EXS. 2163-A to D, inclusive, 2164-A to D, inclusive, 2165-A to D, inclusive, 2166-A to D, inclusive, 2167-A to D, inclusive, and 2168 and 2169, were offered and received in evidence.)

Direct Examination (Resumed) by Mr. Wooden.

Q. Mr. Royal, I am showing you two papers marked, for identification, as Commission's Exhibits 2170 and 2171. Will you tell us where those papers came from and what you know about them?

A. These two exhibits are copies of letters pass-

12382 ing between Dewey Portland Cement Company's main office in Kansas City and their branch office in Davenport, Iowa.

The Exhibit 2170 is a copy of a letter to Mr. F. E. Tyler, President of the company, from L. J. Capen, Sales Manager in Davenport, dated June 17, 1932.

The Exhibit 2171 is a copy of a letter dated August 1, 1932, from the Dewey Company's main office in Kansas City to Mr. Capen.

Q. Where did you obtain the papers, if you obtained them?

A. I obtained the papers from Mr. Capen in Davenport.

Q. And when?

A. In May or June, 1933.

Mr. Wooden: I will offer those two papers.

Mr. Leisure: May I ask the witness a question about that?

Trial Examiner Norwood: Certainly.

Examination on Voir Dire by Mr. Leisure.

Q. This copy doesn't seem to be signed by any one, Mr. Royal. Did you have any conversation with Mr. Capen when you got the letter about it?

A. Yes. I selected the letters from his files and went over all of them with him, and he examined every one. I didn't ask for comment from him on each one, but he saw them all.

12386 By Trial Examiner Norwood:

Q. You were furnished these by an official of the Dewey Company, were you?

A. The sales manager at Davenport.

Trial Examiner Norwood: At Davenport.

By Mr. Wooden:

Q. Mr. Capen?

A. Mr. Capen.

By Trial Examiner Norwood:

Q. They came from their files?

A. They came from their files.

Q. Well, what did you ask for when he produced those?

A. I searched his files, selected certain material and we went over them together, and he gave them to me or copies of them.

Trial Examiner Norwood: Any more objections?

Mr. Zimmerman: No, I have none.

12387 (COM. EX. 2170 and 2171 were offered and received in evidence.)

Mr. Wooden: For your honor's information, I call your attention to the fact that 2170 is addressed both to Mr. Tyler, president, and to Walter Gray, vice president and general sales manager at Kansas City. The other is merely initialed "W. G."

By Mr. Wooden:

Q. Referring to this exhibit, 2171, Mr. Royal, do you know or did you find out in your investigation whether that change mentioned there in the bulk price differential at that time involved a reduction of the differential, or what?

A. I understand it was a reduction of 5 cents in the differential, between—

12388 Mr. Leisure: Now we have got that h ascertained during an investigation and that he understood that a reduction was so-and-so.

Mr. Wooden: Well—

Mr. Leisure: I object to both the question and the answer, and I move that they be stricken.

Trial Examiner Norwood: State the basis of your knowledge.

The Witness: To the best of my knowledge and belief—

Trial Examiner Norwood: No, tell us how you found that out.

The Witness: Well, I found it out by material just like this and statements made by various persons interviewed, that such a thing had been done; that is, that the bulk price differential which had been 10 cents was reduced to 5 cents by the Lehigh Cement Company.

Mr. Leisure: Now, from all that appears there, he may have found that out from a policeman on the beat, which wouldn't be binding, and I object to that. I move to strike it.

Trial Examiner Norwood: Oh, he said from people connected with the Dewey Company.

Mr. Leisure: He hasn't said so.

Trial Examiner Norwood: Is that a fact or not?

12389 The Witness: Yes, I got it from the Dewey Company, from Mr. Capen and from others.

Trial Examiner Norwood: The objection is overruled.

By Mr. Wooden:

Q. Mr. Royal, did you get these two papers, Commission's Exhibits 2170 and 2171—or on what occasion did you get them?

A. Upon the occasion of my interview with Mr. Capen.

Q. At what time?

A. May or June of 1933.

Q. Did you have a subsequent interview with Mr. Capen?

A. Yes, in 1936.

Q. On the occasion of that latter interview, did you ask him anything about the policy of the Davenport office or the Davenport mill of the Dewey Company in its use of basing points?

A. Yes, I did.

Q. Will you state what you said and what he said?

A. I asked him how the Davenport office made up prices in the territory where they sold cement, and further along, I asked him what bases they used in determining their prices.

Mr. Capen stated, though, that prices for all destinations were established for them by the Kansas City headquarters.

12390 Q. Did you ask him anything about the use of basing points in connection with the establishment of their prices?

A. I said the basing points—

Mr. Leisure: That question can be answered yes or no, whether or not he asked him.

A. Yes, I did.

By Mr. Wooden:

Q. What did you say and what did he say?

A. I asked him of the—how they arrived at a price, and he told me the formula for determining a delivered price, but he also told me that the price basis to be used—

12391 A. He said that the price bases to use were designated to him by his Kansas City office.

By Mr. Wooden:

Q. What do you mean by "price bases"?

A. The bases—

Mr. Leisure: Now, just a minute.

A. The basing points.

Mr. Wooden: I take it the witness has a right to explain the language he himself uses in describing a conversation.

Trial Examiner Norwood: I think so.

A. The price bases is meant by me to refer to basing points and prices at those basing points.

By Mr. Wooden:

Q. Now, do I understand, that you also had an interview with Mr. F. E. Tyler, the President of the Dewey Company?

A. I did.

Q. And when was that?

A. That was in 1931.

Q. What did you do? Was that under the Senate investigation that you referred to this morning?

A. Yes.

Q. What did you do at the Kasas City office of the Dewey Company?

A. I interviewed Mr. F. E. Tyler, the President,

12392 and made certain examinations of his files and accepted certain tabulations from him, certain exhibits.

Q. Did you ask Mr. Tyler anything about his connection with the Cement Institute or its activities?

A. I did, and he said that he had been Treasurer of

the Kansas City branch of it, but that it was not functioning, and then he said that he had helped wind it up sometime previously.

Q. Did you have any conversation with Mr. Tyler with reference to the policies of his company as to whether it was a price leader or not?

A. He said they always followed prices.

Q. Did he say whose prices they followed?

Mr. Leisure: I object to this leading. He can tell us what the conversation was.

Trial Examiner Norwood: Yes, answer that yes or no. Did he say or did he not say?

The Witness: I will think that over just a minute.

Trial Examiner Norwood: Yes.

A. Yes, I think he did.

By Mr. Wooden:

Q. Whom did he mention in that connection?

A. As I recall it, to the best of my recollection, he mentioned that in the Kansas City territory the Lone Star was one of those establishing prices.

12393 Q. Did you have any conversation with him as to the identity of any concern or concerns known as price cutters at that time?

Mr. Zimmerman: Speak up a little louder, please, Mr. Royal.

A. I did.

By Mr. Wooden:

Q. What did you say and what did he say?

A. I asked him whether any companies operating in his territory were known as price cutters. He said that the Marquette Company was known as a price cutter.

Q. Did he mention any one else?

A. I don't think he did as to cutting prices.

Q. Did you have any conversation with Mr. Tyler as to the establishment of base prices at any of the mills of his company?

A. (No response).

Q. Do you know where the mills of the company are?

A. I was trying to place the other one. One is at Davenport. I just can't place the other offhand. It is south of Kansas City somewhere.

Q. Do you recall whether or not the Dewey Company had a mill at Dewey, Oklahoma?

A. That is where the mill was.

Q. Do you know whether they had one at Ada, Oklahoma?

12394 A. I didn't recall that the Dewey Company had one at Ada.

Q. Well, did you have any conversation with Mr. Tyler about the establishment of any base prices at their Dewey, Oklahoma, mill?

A. Yes, I did, and I would like to be given the opportunity of refreshing my memory on that from some notes that I have.

Q. All right.

A. I haven't got the notes right here, though.

Q. Did you have any discussion with him regarding the use of an Iola base price?

12395 A. That is another thing that I would like to refresh my mind on.

Mr. Wooden: Will you give those numbers, please?

(The documents referred to were marked "Commission's Exhibits 2172 to 2188," both inclusive, for identification.)

By Mr. Wooden:

Q. Mr. Royal, I am showing you a number of papers marked for identification as Commission's Exhibits 2172 to 2188, inclusive. Will you examine them and tell us where they came from and what you know about them?

(Handing documents to witness.)

A. Exhibit 2172 is a photostatic copy of a letter from—a letter dated March 15th, 1929, to Mr. L. J. Capen. It is from Mr. F. E. Tyler, president of the company.

Q. How do you know that?

A. I know that because the word "President" is signed down below and the initials "F. E. T." appear.

Trial Examiner Norwood: Well, now, I think you better tell us what you know about those papers outside of what the papers say themselves. Tell us where you got them and all about them.

Mr. Wooden: That is just what I asked for.

By Mr. Wooden:

Q. I asked you where they came from and then

12396 what you know about them.

Trial Examiner Norwood: Did all of them come from the same files?

Mr. Wooden: I think so.

A. These were obtained from the files of the Dewey Portland Cement Company at Davenport, Iowa.

By Mr. Wooden:

Q. Davenport?

A. No, at Kansas City, I should say. They were obtained during Novemer of 1931, I think.

Q. The last one, No. 2188, was that also obtained at the same time?

A. That was obtained from the files at the same time.

Q. Do I understand you to say that all of these papers whose numbers I have given you were obtained at that same time from the files of the Dewey Company at Kansas City?

A. That is right.

Q. Do they consist of—are they photographs of selections that you made, and if so, where were the photographs made?

A. They are selections from originals that I secured from the files with the approval of Mr. Tyler, the president of the company. Where the photostats were made, I am not sure, whether they were made in Washington or Kansas City.

Q. This No. 2188, what is that?

12397 A. This was given to me by Mr. Tyler—

Trial Examiner Norwood: I think that is what he means.

A. (continuing) —as being of interest in an investigation of this kind and a study of basing points. It is a map gotten out by an old traffic association of the mills, the cement mills around Iola, Kansas.

By Mr. Wooden:

Q. Was the typewritten text that appears on the map in the lower left corner, was that a part of it as you received it from Mr. Tyler?

A. Yes, that was a part of it.

Mr. Wooden: I will offer these exhibits in evidence at this time, your honor, running from 2172 to 2188, inclusive.

Trial Examiner Norwood: Any objection?

Q. When you say the latter, Mr. Royal—

12398 Trial Examiner Norwood: Wait a minute. The proffer is pending.

Mr. Wooden: This is further regarding the identification.

Trial Examiner Norwood: Oh, go ahead.

By Mr. Wooden:

Q. When you say the latter, that is a map, so and so, are you stating that on your own authority, or on the authority of any information given to you by Mr. Tyler?

Mr. Leisure: Well, it says so on the map.

A. Well, the map speaks for itself. It was also described to me by Mr. Tyler.

12400 CHARLES HORNER, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am president of the Kosmos Portland Cement Company. The Company has one mill located at Kosmosdale, Kentucky. The mill has been in existence about thirty-three years.

Q. What selling territory does it make cement sales in?

A. Kentucky, Southern Indiana, and southwestern Ohio.

Q. Is the mill at Kosmosdale a basing point mill?

A. It is.

Q. Has it always been?

A. No, it has not.

Q. Will you state when it became a basing point mill?

12401 A. In the summer of 1932, I think.

Q. Did you make it a basing point mill or some other company?

A. Some other company.

Q. What other company?

A. The Lehigh quotations are the ones we found making it a basing point mill.

Q. What were the circumstances as you knew them that preceded the making of Kosmosdale a basing point by Lehigh?

A. I don't know whether I understand.

Q. What was the situation in the industry in and

around as far as affecting your company was concerned at that time?

A. Well, it was—

Mr. Leisure: I think that is a very broad question. I think counsel should be more specific as to what he wants from the witness.

Trial Examiner Norwood: Objection overruled.

Mr. Wooden: I will make it more specific by asking:

By Mr. Wooden:

Q. What were the competitive conditions, or what was the competitive situation at that time?

A. Well, it was a time of depression and very keen competition, of course.

Q. Did you regard the establishment of a base 12402 at your mill as a form of severe competition?

A. Well, it had a tendency to give us a less net return, yes.

Q. Did you ever establish a basing point at any other mill than your own?

A. Not consciously, no.

Q. Did you ever do it unconsciously?

A. I can't say as to that.

Trial Examiner Norwood: He might have found it out later.

Mr. Wooden: Yes, that is just what I was about to say.

By Mr. Wooden:

Q. After your Kosmosdale mill was made a base point by Lehigh, did the price there go any lower or did it remain at that point?

A. You mean did our price go lower than the basing price that they had established there?

Q. Yes.

A. I don't recall that it did.

Q. What injury, if any, results from the putting of a base price at a mill such as was done in the case of Kosmos?

12403 A. Well, the immediate effect is usually to give that mill a less net return than it had been getting.

By Mr. Wooden:

Q. On all of its business or just on a part of it?

A. Just on part of it.

Q. Well, you can't get any more than your base at your mill, can you? Isn't that your maximum mill net?

A. Yes.

Q. Well, then, what do you mean by saying just on part of it?

A. Well, because we may have previously been taking a net return of less than the new base on some distant business.

Q. On some distant business?

A. Yes.

Q. Do you mean in some other basing point territory?

A. In some territory in which the price is made by another basing point, yes.

12404 Trial Examiner Norwood: Well, when another mill at another point from the location of your mill establishes a basing point at your mill, does that confine you to that base price in selling in your locality?

The Witness: That is the maximum net return we can get at our mill.

Trial Examiner Norwood: You can't in selling right in the same town and in the adjacent territory add on some freight to it?

The Witness: Not if we are basing on our mill at a certain maximum price.

By Mr. Wooden:

Q. Do I understand, Mr. Horner, that you had been making some prices in distant territory at destinations that were less than the base price of the mill which governed that territory?

A. Although we may have made some in meeting competition in certain cases, we have never done it in the first instance, so far as we know.

Q. I see. Do you mean that in some cases to meet competition you made the delivered price less than the sum of the controlling base price plus freight to that destination?

A. Yes, sir.

Q. Did you regard this establishment of a base price at Kosmosdale by Lehigh as in any way connected

12405 with your having sold at less than the regular delivered price in other territory?

A. I didn't see any direct connection, no, sir.

Q. Did you see any indirect connection?

A. No, I can't say that I did.

Q. How long was it before Kosmos itself established a base price at Kosmosdale?

A. Well, that would be hard to say. When we found this base on our mill, we immediately adopted it with our price and our—

Q. You mean, then, that Kosmos never of its own or on its own initiative put in a base price at Kosmosdale?

A. Well, later on we raised our base, if that is what you mean.

Q. Well, that is really what I meant.

How much later on?

A. I can't say. I have no direct recollection on that, probably a few months.

Q. Do you recall who in your territory initiated the increase in the price during the summer of 1932?

A. I have no clear recollection of the movement of prices in there; it may have been ourselves.

Q. Have you been a leader in the making of prices or have you been a follower?

A. Both, but more a follower than a leader, I
12406 should say, on account of our—

Q. Can you give any particular instance when you were the leader?

A. It is my impression that when we raised that original base at Kosmosdale, we were the first people that did it; naturally, would be.

Q. Any other instances other than that?

A. I can't think of any other.

12407 Q. Do you mean over a period of—how long have you been connected with the company?

A. A great many years.

Q. Well, how many, twenty?

A. Yes, well over twenty.

Q. You mean to say that in a period of twenty years that is the only instance you can recall where you took the lead in advancing the price?

A. I think so.

By Trial Examiner Norwood:

Q. Did you take the lead in reducing it?

A. I can't recall that we did, no, sir.

Q. Well, why was this base established at your mill then by another mill?

A. Well, I am not familiar with the reasoning of that.

By Mr. Wooden:

Q. Is that the only instance in the history of the Kos-

mos Company that you know of where someone established a base price at Kosmosdale?

A. I believe so.

Q. Did putting that base in there at the price at which it was put in in 1932,—by the way, what was the price, can you state?

A. I think it was 90 cents stripped at the mill.

Q. Did such a price tend to make your entire
12408 business there unprofitable?

A. Yes, that was too low a price to be profitable.

Q. After you increased your price there or Kosmos did in the summer of 1932, I believe you said, did you have any arrangement or make any arrangement with the Marquette Company whereby you filled some of their orders in Cincinnati?

A. We did fill some orders for them at one time. I can't say whether it was in '32 or '33.

Q. That was in Cincinnati?

A. In Cincinnati, yes.

Q. Did you fill any elsewhere?

A. Not at that time, as I remember it.

Q. At what time did you fill any elsewhere?

A. Well, a number of years later there was one particular piece of business that we filled.

Q. Will you describe the instance you just referred to?

A. It was a rather complicated transaction. It came about through a dealer in Memphis, Tennessee, from whom we bought a boat with the arrangement—

Mr. Zimmerman: Bought what?

The Witness: Bought a boat, a tow boat, with the arrangement that we would pay for it in cement.

The Marquette Company got a road contract at that time or shortly afterward in the central part of
12409 Kentucky. The dealer in Memphis arranged with the Marquette Company on terms that I know nothing of, whereby I presume he took cement from them at Memphis, and we shipped cement to this point in central Kentucky.

By Mr. Wooden:

Q. Was that point pretty near your mill?

A. (Continuing) —which was applied against the purchase of the boat. It wasn't very close. I don't recall just where it was; say 100 miles, something like that.

Q. What were the reasons actuating Kosmos Company in making that arrangement?

A. Well, we really had nothing to do with it. The dealer in Memphis to whom we owed the cement for the boat simply asked us to ship it to this point instead of to Memphis. It didn't make any difference to us.

Q. Did you gain anything by it?

A. I don't think so, except that we got the boat paid for a little sooner than we might have otherwise.

By Trial Examiner Norwood:

Q. That is, he paid you the transportation price to Memphis and you delivered it at the shorter distance, is that right?

A. No, I think not. I can't recall the details on it exactly, but I think it was worked out at the going 12410 price at the respective places.

By Mr. Wooden:

Q. At the respective destinations?

A. Yes.

Q. Did that give your concern a larger mill net on the Kentucky business than it would have done on the Memphis?

A. It probably did. I don't remember.

Q. How many barrels were involved in that transaction?

A. I couldn't be sure on that. It was a road contract. I should guess somewhere between 17 and 20 thousand barrels.

Q. Now, is your mill located on a river?

A. Yes, it is.

Q. The Ohio River?

A. Yes.

Q. Do you calculate your delivered prices by using the base price plus rail freight to destination?

A. We meet whatever prices we find at destination.

Q. Don't you ever use a base price in calculating your destination price?

A. Use our own base, you mean?

Q. Well, sometimes you own and sometimes when you go into other base mill territories, don't you use other mill base prices?

A. Well, we find out what they are through taking the prices we find at destination.

12411 Q. But after you find out what the mill base price is, you apply it—

Mr. Leisure: Now, he didn't say that, Mr. Wooden. His answer is very clear.

Trial Examiner Norwood: Read the answer, please.

(Answer read.)

Mr. Leisure: It is clear he is talking about destination prices and not base prices.

By Mr. Wooden:

Q. Didn't you mean, Mr. Horner, that after you found out what the base prices were by figuring back from the destination prices, then you used the base prices plus the freight on base to destination?

A. We probably do that subject to checking all the time at the destinations to see if they are right.

Q. Do you ship cement from your mill by water?

A. A certain amount.

Q. What percentage would you say?

A. Oh, that varies so much from year to year, that I couldn't—

Q. Well, give us some idea of the range.

A. I would say the range might be 15 to 20 per cent of what we ship in a year.

Q. Do you ship to Cincinnati by boat?

A. Yes, we do.

12412 Q. Does that represent a substantial saving over the cost of shipment by rail?

A. That is something we have never been able to establish to our own satisfaction.

Q. Do you ship in your own boats?

A. Our own barges.

Q. Your own barges. How long have you been doing it?

A. About fifteen years.

Q. And even though doing it fifteen years, you don't know really whether it is to your advantage to do it or not?

A. Well, you asked whether it was at a lower cost. There are so many factors in there that I can't give you a clear answer on it. We do think it is an advantage, in that it gives us a local position in Cincinnati we wouldn't have otherwise.

Q. Now, coming back to this arrangement you referred to a while ago, when you filled some orders in Cincinnati

for Marquette business, will you state how that arrangement came about?

A. My recollection is very vague on the subject. I am not sure that I handled it, but I think, rather think Marquette got oversold, at the moment, and were not able to make delivery and asked us if we wanted the business and to step into their shoes.

Q. Did they fill any business for you in any ter-
12413 ritory at that time?

A. Never have, to the best of my recollection.

Q. About how much did you supply for Marquette at that time?

A. I have no idea. It wasn't any great amount.

Q. Well, was it thousands of barrels, or what?

A. Well, my best guess would be 10 to 11 thousand barrels, something of that sort.

Q. Did the price go up before you took that business for Marquette?

A. Before we took it?

Q. Yes.

A. Probably not.

Q. Was Marquette accustomed to sell regularly in Cincinnati?

A. No, you wouldn't call them one of the regular mills for Cincinnati.

Q. How did they get over in Cincinnati at that time, if you know?

A. At that time I think they were reaching out pretty well in all directions for more tonnage.

Q. Were they cutting prices?

A. I think probably they were.

Q. Do you know whether or not Marquette had other mills than your own fill some of their orders in the Cincinnati territory?

12414 A. I have no knowledge as to that.

Q. Or any other territory?

A. I simply don't know.

Q. Did Kosmos pay Marquette any margin of profit beyond the business that you took over?

A. I believe not. I think we simply stepped into their place.

Q. Was that after the low point of prices had been left behind?

A. I can't say. A moment ago I said to the best of my

recollection we stepped into that situation before there was any price advance. That is my best recollection on the subject.

Q. Did you solicit Marquette for such an arrangement or how did it come about?

A. It is more or less a matter of conjecture on my part.

12416 The Witness: Well, I have no definite recollection on the matter.

Trial Examiner Norwood: Well, that answers it.

By Mr. Wooden:

Q. You can say, at least, can't you, Mr. Horner, whether or not your company solicited the arrangement or not?

A. I feel sure we did not.

Q. Can you say whether Marquette solicited it or not?

A. I feel pretty sure they did not.

Q. Well, then, that leads all the more to the next question:

12417 Who did, if you know?

A. I think the buyer was probably getting rather poor service and brought pressure to bear on Marquette to see if it couldn't do something about it.

Q. Did any other concern or representative of any other concern in the cement industry interest themselves in the matter?

A. Not that I can remember.

Trial Examiner Norwood: Did you hear from the Institute about it or the Code Authority?

The Witness: I think this was—

Mr. Wooden: This was 1932.

The Witness: Prior to the Code Authority. I can't recall that the Institute interested themselves in it at

12418 all.

Q. I will ask you, Mr. Horner, whether or not your recollection is refreshed if I should ask you whether in July, 1932, Marquette increased its prices by 40 cents a barrel.

A. I have no recollection on that subject.

12419 Q. Do you have any recollection whether or not Kosmos increased its prices in July of 1932 by 25 cents a barrel?

A. I have no—I haven't those things in mind at all, no.

12420 Q. Can you say now, Mr. Horner, whether or not
12421 it was about October, 1932, that you filled this order in Cincinnati for Marquette?

A. I am unable to fix the date.

Trial Examiner Norwood: Did you fill that order in Cincinnati for Marquette?

The Witness: Yes, sir.

Trial Examiner Norwood: Objection overruled.

The Witness: May I correct that? We did not fill it in the sense that we billed it, billed the cement to Marquette. The order was simply transferred from them to us and we stepped into their shoes.

Trial Examiner Norwood: And they requested you to fill the order?

The Witness: To the best of my recollection, that came about through the buyer.

12422 By Mr. Wooden:

Q. Do you recall, Mr. Horner, a visit made to your office in June, 1933, by a representative of the Federal Trade Commission?

A. I had forgotten it until Mr. Paulson called on me on Saturday and showed me the record of that visit, and that refreshed my memory.

Q. Do you now recall it?

A. To a certain extent.

Q. Do you remember who it was?

A. The gentleman was named Bangert, or something of that kind.

Q. Did he take up with you the matter of your
12423 bidding or your bids on the Illinois highway business?

A. Apparently he did from the record I saw on Saturday.

Q. Did Mr. Bangert ask you in any questions, Mr. Horner, as to why your mill did not quote F. O. B. mill on its bids to the State of Illinois in 1933?

A. Apparently he did.

Q. Did you prepare an answer to any such questions?

A. Yes, I told him I preferred to write my answer to that question.

Q. And did you do so?

A. Apparently I did.

Q. I am showing you papers marked, for identification, as Commission's Exhibits 2189-A and B. Is that a copy

of the written statement that you gave to Mr. Bangert in answer to his question as to why you did not sell F. O. B. mill or quote F. O. B. Mill to the State of Illinois?

A. I saw this this morning, and while I have no way of checking it, I have no reason to doubt that this is a true copy of what I wrote at that time.

Mr. Wooden: I will offer that in evidence, your
12424 Honor.

Examination on Voir Dire by Mr. Leisure.

Q. Have you any way of knowing whether this contains everything that you said at that time on the subject?

A. No, I have no way of knowing that.

12425 By Mr. Wooden:

Q. Were you asked, Mr. Horner, to see if you could locate the statement or a copy of it?

A. Yes.

Mr. Leisure: The statement was given to the investigator, as I understand it.

By Mr. Wooden:

Q. I believe you said that you have no reason to doubt that that was a true copy of the statement you gave him?

A. I have no reason to doubt it; on the other hand, I can't swear that it is complete. I just don't know.

Q. Well, so far as it goes, you recognize it as the statement that you made?

A. I should say so, yes.

12426 By Mr. Zimmerman:

Q. Is this something that you prepared, Mr. Witness?

A. Yes, it is.

Q. I mean, this particular copy, is this something you prepared?

A. Oh, no; no. I have nothing in my possession from which I could prepare it.

12427 By Mr. Wooden:

Q. Have you examined these papers marked 2189-A and B, have you read that through, Mr. Horner?

A. Not carefully.

By Trial Examiner Norwood:

Q. You read it through and tell us whether or not you at one time made that statement.

(Handing document to witness, and which was thereupon examined by the witness.)

A. What is the question now?

(Question read.)

A. Your honor, I believe I did.

(COM. EX. 2189-A and B was offered and received in evidence.)

Q. Mr. Horner, did you have recourse in the preparation of that statement to any sources of information outside of your company?

A. To the best of my recollection, I wrote it just
12428 from my own ideas.

12429 Q. Mr. Horner, at the time you prepared that statement had you received written or printed statements of a partially similar character from The Cement Institute or any of its branches?

A. I have no such recollection. To the best of my belief, these are my own ideas.

Q. Mr. Horner, I am showing you Exhibit 571-5C and -5D. Do you recognize that as a copy of a letter
12430 written by you to Mr. Affleck in April, 1934?

A. The form of it looks so. Do you wish me to read it?

Q. Enough to enable you to answer the question.

A. I had forgotten this, but I think I wrote it.

Q. Now, referring to Exhibit 571-5C, what was the report on plans to improve public relations that you referred to there?

A. I really don't remember what that was. It must have been something sent out by Mr. Affleck in the nature of a circular letter.

Q. I am now showing you papers marked for identification as Exhibit 2190-A to J, inclusive, and I will ask you if that is the report of plans that you referred to in this letter.

(Handing document to witness.)

12431 A. Well, the date seems to correspond, and the subject matter, so I presume that my letter was in response to this (indicating).

Q. Do you recall having seen the paper of which 2190-A to J is a duplicate?

A. It is very difficult to answer. Having it in my hand, my feeling is that I did see it. If it weren't here, I wouldn't be able to say.

Q. Was your letter to Mr. Affleck, which is Commission's Exhibit 571-5C and 5D—did it make comment on this plan, which is Commission's Exhibit 2190-A to J, inclusive?

A. It appears to, yes.

Mr. Wooden: I will offer this Commission's Exhibit 2190-A to J, inclusive, your Honor.

Trial Examiner Norwood: On the record. Any objections?

Mr. Leisure: We have no objection.

Mr. Wooden: May it be stipulated that Commission's Exhibit 2190-A to J, inclusive, is a duplicate of a document that was produced by Lehigh Company under the subpoena of last February, but which has not been offered in evidence?

12432 Mr. Leisure: I don't think a stipulation is necessary. You should offer the Lehigh instrument. I don't see any reason for building up the record with a useless stipulation.

Mr. Wooden: That is what I wanted to avoid, offering a duplicate document.

Trial Examiner Norwood: You may stipulate that subject to check.

Mr. Leisure: It is unnecessary to get all this on the record. The exact document was produced long ago, in March, and now we are getting into another one and asking that it be marked and offered, and to stipulate that it is a duplicate of the one that is already marked.

Trial Examiner Norwood: Evidently they haven't got the other one here.

Mr. Leisure: Oh, yes, we have got copies of it. They must have.

Mr. MacIntyre: But we don't have. It has been returned to the respondents at their insistence back in March of 1938, or were not at that time offered.

Mr. Leisure: Then that is all right.

Mr. Wooden: This is the first offer of this paper or any duplicate of it which has been made.

Trial Examiner Norwood: Yes.

12433 Mr. Wooden: I merely wanted to tie it to the document that was produced under the subpoena. They even have the number here supplied.

Mr. Leisure: Subject to check that this is the same, and we will check it, and if that is so, we will agree that it is a duplicate of which the Lehigh one is another.

Trial Examiner Norwood: Yes.

Mr. Leisure: Duplicates, in other words.

Mr. MacIntyre: Mr. Leisure, since the number as was called out by Mr. Withrow was off the record, may we now have the number of that one that he has on the record so that we can therefore compare them?

Mr. Leisure: I think that is a good idea.

Mr. MacIntyre: Yes.

Trial Examiner Norwood: The stipulation, then, as I understand it, refers to the similarity or identity of Commission's Exhibits 2190-A to J, with No.—

Mr. Withrow: 849-4V through 5E.

Mr. Leisure: And his stipulation is that they are duplicates.

Trial Examiner Norwood: Yes.

Any objections?

Mr. Zimmerman: I am looking this over as rapidly as I can, sir. I don't think the content of it would have anything to do with my objection, anyway.

12434 As I understand, this exhibit, Commission's Exhibit 2190-A to J, is something that was received by this witness. I don't see that it would have any bearing on the respondent that I represent, so I can't see any particular objection to it any further than that.

By Mr. Wooden:

Q. Mr. Horner, while you are here, I want to ask you whether you can state what exhibits 817-F and 817-G and 817-H are.

A. This appears to be a memorandum on certain subjects that I handed to Mr. B. H. Rader. Just when—

Q. Is 817-F in your handwriting?

A. No, that is not.

Q. Whose is it?

A. I couldn't say. Is it supposed to be from our office?

Q. Well, my own understanding is that the documents were produced by your company under subpoena last winter.

A. It might be Mr. Clancy's handwriting.

Q. Who is he?

12435 A. He is secretary of our company.

Q. And 817-G and H, what do you know about them?

A. That appears to be a carbon copy of a—I have just stated what that was.

Q. I see. All right.

Now I am showing you Commission's Exhibit 962-C and D. Did your company receive that letter in the mail from A. R. Burns?

A. Personally, I had nothing to do with the Burns correspondence. It appears to have been received by our company.

Q. Do you know that there was such correspondence between your company—

A. In a general way, I know we did correspond with him.

Q. Do you know whose handwriting it is at the end—in pencil—at the end of the third paragraph?

A. I rather think that is Mr. Clancy's, too, although I am not certain.

Trial Examiner Norwood: Does it look like it?

The Witness: Yes, it looks like the other handwriting. It may well be his.

Cross Examination by Mr. Leisure.

12436 Q. Mr. Horner, I would like to get clear what you meant on direct examination in response to a series of questions put by Mr. Wooden, when he asked you what you did when you went into a new market as to whether or not you found out what the prices were in the new market.

Now, did you intend to say that you found out what the market price was or that you found out what the base price was?

A. I thought I said we found out what the delivered price was at that point.

12437 Q. Yes. And that is what you intended to say when you were describing your activities of going into a new market?

A. That is right.

Q. Is that correct?

A. That is right.

Q. And the thing that interests you, is it not, when you go into a new market is what the delivered price is in that market which you must meet?

A. That is right.

12438 Q. Mr. Horner, how does your company make the prices which it quotes in its sales territory, which Mr. Wooden was asking you about?

A. Well, we start with an effort to get our—to get the

full return allowed by our base. If, however, our full price, plus our freight, makes a delivered price in any one market, that we find is higher than the lowest delivered price from other sources in that market, then we shrink our base sufficiently or absorb freight, if you put it that way, sufficiently so that our delivered price will not be higher than other prices we find in that particular market.

Q. That is, you find it necessary to meet the price?

A. Yes, we can't sell cement at a higher delivered price than other cement is offered at at the same location.

Q. Then is it the policy of Kosmos to attempt, wherever possible, to obtain its base as a mill net on its sales?

A. It is.

Q. Yes. In what proportion would you say, if
12439 you know, of the volume of your sales, does it obtain its base figure as a mill net?

A. I really don't know.

Q. Well, would you say it was more or less than 50 per cent?

A. I would say considerably less than 50 per cent.

Q. What is it, if anything, which prevents your company from obtaining the mill net equivalent to its base on all of its sales or on more than this percentage?

A. Well, it is the competitive prices we find at the various destinations to which we have to ship in order to do business.

Q. And that affects the base, as you have described?

A. That makes us take a less net mill than our full base.

Q. When you meet those prices?

A. Yes.

Q. Do you know or do you not know by reason of this price competition that you have described that it is impossible for your company to obtain a mill net equivalent to its base in many markets?

A. It is impossible for us to obtain the full net return of our base when shipping to many markets.

Q. And you have already told us that you come as close, however, to that as you can, as close as your competition will allow?

12440 A. That is true.

Q. Now, in many of these markets are the prices so low as to affect the net return, as to create a loss to your company?

12442 A. The net return to us on certain business is so

low that if we had to do all or a great part of our business at that net return, it would cause us a loss.

Q. And do those situations arise frequently in the sales that you make, Mr. Horner?

A. Yes, it is always a question whether we shall take certain business that gives us a low net return in order to have that additional volume or whether it is better not to take it.

Q. Now, in those situations where it would net a loss, why don't you increase the price?

A. Our competition at those points wouldn't permit us to make any sales if we increased the price.

Q. In other words, you are meeting the market price again?

12443 A. Yes.

By Trial Examiner Norwood:

Q. What would be the result if you did come under the price?

Q. Would the other side meet it?

A. Unquestionably.

The Witness: If we made a lower delivered price than was already existing in the market, the other people would meet it, unquestionably.

12447 *Redirect Examination by Mr. Wooden.*

Q. Mr. Horner, when you said you may have made lower prices to the State of Kentucky, did you mean lower prices than were represented by the sum of the applicable basing point price plus freight?

A. Yes, that is what I mean.

Q. Do I understand you to say that you are all the time selling some trade at a loss?

A. I think a loss is very difficult to find. I don't think you can pin it on any one sale. You have to take it—take the overall results of your—

Q. You mean you have to consider your average mill net?

12448 A. You have to consider your average mill net and what volume you will get by your sales, and so forth.

Q. Well, that may be and doubtless is the case so far as your general business is concerned, but to get your average mill net which determines, as I take it, whether you are making a profit or a loss on the whole business—isn't that correct?

A. It should, yes.

Q. Are you selling some customers at mill nets that would show a loss?

A. Well, there I have to repeat what I said a while ago, that we probably sell some customers at net returns at our mill which if they were applied to all or most of our business would show a loss.

Q. Yes, if applied to most or all of your business, but you sell some customers at mill nets which are not applied to your business as a whole?

12449 The Witness: If we did not sell lower than our average, then we would have only one price.

By Mr. Wooden:

Q. You do, then, sell to some customers at different prices than you do others?

A. We make a different net mill return on certain business than we do on certain other business.

12450 Q. Do you have a minimum mill net below which you will not go?

A. We have no rigid figure of that sort, but if a piece of business becomes questionable from that point of view we consider whether we want to take it or not—

Q. Well, what determines whether you will take a given piece of business at a given mill net?

A. Why the volume of orders we have on hand and the customer involved might have something to do with it.

Q. Well, does the relation of that mill net to your cost have anything to do with it?

A. Well, of course, that is the first consideration.

Q. Do you sell some customers at as low a mill net as 75 cents a barrel?

A. I doubt if we ever have.

Q. What is the lowest you ever knew of going?

A. I have tried to forget those figures. I don't know. I think that this is purely a guess because I don't know. I think around 85, maybe.

Q. When your base was 90 cents, didn't your mill net go away down in some cases, way below 90?

12451 A. It does seem like that it would have. I don't just remember what the figures had been.

By Mr. Wooden:

Q. Did you make shipments to Huntington, West Virginia?

A. At that time?

Q. Yes.

A. I can't answer that.
Q. Did you make them to Cincinnati at that time?
A. I am sure we did, yes.
Q. What would your mill net have been on the Cincinnati shipments on the 90 cent base price?
A. Well, I don't think that our price at Cincinnati was affected by our base.
Q. Well, that is what leads me really to ask the question. You were, as you put it, absorbing freight when you went into a territory where your base didn't control?
A. That is right.
Q. And how much less than 90 cents did it net you there?
A. I can't answer from recollection what it would have netted at Cincinnati, the net from Cincinnati at that time.
Q. What territory was controlled by Kosmosdale as a base?
12452 A. At what time?

By Mr. Wooden:

Q. Well, during this low price period when it first became a base, and then take the present time. Answer both.
A. Well, I can't answer the first. I just don't remember how far our base may have gone. At the present time it controls a rather small area, generally speaking, south and west of us.
Q. Well, give us some idea of what that area is.
A. I should say that I am not in intimate touch with the sales and so on. My general impression is that it would include Louisville and Owensboro, Kentucky, Litchfield, Kentucky.
Q. How far east in Kentucky and how far west?
A. Munfordville. I forgot to give that to make a kind of triangle there.
Q. Any part of Indiana?
12453 A. No, I think not, I think not.
Q. You don't get outside of Kentucky with your base?
A. I think not.
Q. At the present time.
You referred to this matter of absorbing freight. Isn't the freight from your mill the same no matter where—I mean no matter how you figure your destination price?
A. I would like the question read. The question is not clear to me.
(Question read.)
A. Yes. When I say absorbing freight, that is simply

one way of saying that we accept a less net return at our mill than we would get on our full base. It can be put in several ways.

12454 Chicago, Illinois,
December 14, 1938.

12457 DANIEL J. VARADY, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. MacIntyre.

12458 We are in the trucking business. At the present time we are doing material hauling and excavating. The name of my company is Varady Trucking Company located at East Chicago, Indiana.

Q. How long have you been so engaged?

A. Well, we started trucking, general trucking in 1923. At that time we started to haul cement from the cement plant at Buffington, Indiana into Chicago, and we worked at that—

Q. Have you continuously hauled cement from Buffington, Indiana into Chicago?

A. We have until 1932, and at that time there was, as we understand it, a 15 cent—

Mr. Leisure: Just a minute. I think you answered the question.

12459 The witness identified Com. Ex. 1012 A as a photostat of a letter dated May 19, 1934, he wrote to the Cement Institute; Com. Ex. 1012B as a copy of the letter he received from "them" in reply to his letter of May 19th.

Q. Now, I believe you stated, Mr. Varady, that you had for a number of years, up until 1932, engaged in the trucking of cement from Buffington, Indiana, into the City of Chicago. From what place in Buffington did you truck cement?

A. What do you mean by that?

Q. Well, was it from a manufacturer's plant or warehouses, or—

A. It was from a manufacturer's plant.

Q. What plant?

A. Universal-Atlas Cement Company.

Q. At Buffington, Indiana?

A. At Buffington, Indiana.

Q. To what points did you truck?

A. Various points in Chicago.

Q. Will you name some of them?

12460 A. Well, we hauled to all these Loop jobs in Chicago and for various material dealers.

Q. Did you haul cement for any of the South Chicago points, dealers and job sites?

A. Yes.

Q. About what was the volume of your trucking of cement insofar as your income from it was concerned during the year 1931, Mr. Varady?

12462 A. In 1931 we did $55,000.00 worth of trucking of cement.

By Mr. MacIntyre:

Q. How much trucking of cement did you do as to total volume of business, in terms of dollars, in 1932?

A. $3,000.00 worth.

Q. Would you say that the years immediately following 1932, that is, represented in volume of hauled cement, amounted to considerably in excess of 1932 or were they about the same?

A. About the same.

Q. Can you tell us why the difference, if you know, in the volume that you did in the hauling of cement in 1931 as compared to the year 1932 and subsequent years?

12463 A. Well, in 1932 when we were to sign up our contracts for that year, why, we understood that the price of cement at the plant at Buffington would be 15 cents a barrel higher loaded into our trucks than loaded into freight cars, and the average freight rate from Chicago into the Chicago area is 25 to 30 cents a barrel, so that naturally stopped us from the trucking, although in very rare cases where a job was away from a team track or in case of emergency, we were called in.

12464 Trial Examiner Norwood: You mean with the 15 cent surcharge and the added cost of trucking you couldn't meet the 30 cents freight charge; is that right?

The Witness: No, sir. At that time the freight rate into Chicago was 25 cents a barrel.

Trial Examiner Norwood: Yes.

The Witness: And we were getting 30 cents a barrel to the Loop for trucking. Well, we would have to truck that cement for 10 cents a barrel to compete with this differential.

Trial Examiner Norwood: I see.

By Mr. MacIntyre:

Q. Mr. Varady, did you in connection with the trucking of cement from the Universal-Atlas plant at Buffington, Indiana, note at the time that you were so engaged or supervising the loading of the cement at the plant the facilities that were used by that company in the loading of your trucks and in the loading of railroad cars?

A. Well, the plant at Buffington, Indiana, had, oh, I should say, ten or twelve loading doors through which they can load cars and trucks at the same time, and if trucks are in the plant, why, they can load trucks and if there aren't any trucks, they can load cars.

The loading is continuous and it doesn't seem to make any difference whether they are loading into trucks
12465 or loading into cars; their production keeps on going.

Mr. Leisure: Now, I object to that. I ask and I move to strike out the last part of that answer "doesn't seem to make any difference." That is clearly the witness' own conclusion.

Trial Examiner Norwood: Have you been present and superintended these loadings of trucks and observed the loading of cars from the mill?

The Witness: Yes, sir.

Trial Examiner Norwood: Objection overruled.

By Mr. MacIntyre:

Q. Mr. Varady, did you notice whether or not it was the practice of the company to load both trucks and railroad cars at the same time?

A. They do.

Q. Did you notice whether or not they did do so?

A. Yes.

At that plant?

12466 A. Yes.

Q. So far as you know, is that still the practice?

A. Yes.

Q. Now, I will ask you to state in so far as you can from your own knowledge the manner in which these trucks and railroad cars were loaded in so far as the details were concerned. Just how was the cement loaded onto both the railroad cars and the trucks?

A. Well, the cement was sacked in a building, and they had a conveyor belt that brought the cement in bags out to the platform, and they had laborers with hand trucks

that loaded, put these bags on the hand trucks and wheeled them either into the car or into the truck.

Q. How many bags did the laborers load onto each hand truck that they pushed onto the cars and into the trucks?

A. Well, it all depended on the amount of cement a customer wanted. In our case on our trucks, they always wheeled eight bags at a time.

Q. How many did they wheel on each hand truck that they wheeled into the railroad cars?

A. Well, it all depended on the size of the cars and the size of the orders, but I have noted at times where they only wheeled four and five bags to a truck.

Q. Did you ever note that they wheeled as many as eight bags per hand truck into a railroad car?

12467 A. No.

Q. That is, as a general practice, did you note as to what number of bags that they did wheel into railroad cars per hand truck for each trip?

A. Well, I know that their general average was about six bags.

Q. I believe you stated that they wheeled eight bags per hand truck load into your trucks?

A. Yes.

Q. How many barrels or bags of cement did your trucks handle on each load that they moved from the Universal-Atlas plant?

A. Well, the loads varied. When we had a big paving job, we hauled as high as 175 barrels in one load. That was a truck and two trailers.

Q. A truck and two trailers.

Can you state of your own knowledge whether or not that exceeded or was less than some railroad cars that you saw loaded at that plant?

A. It must have exceeded some of the cars.

Q. How many pieces of equipment did you have for trucking in 1931, Mr. Varady?

A. About thirty pieces.

Q. Of what did that consist?

A. Of ten big six-wheelers and twenty trailers.

Q. When your business was cut down in 1932 as

12468 a result of this 15 cents per barrel differential that was placed on it, what became of your equipment?

A. Our equipment laid idle there. Then we eventually had to dispose of it. We still got all our trailers parked in a garage as we left them there in 1932. Since then
12469 the laws have changed and much of that equipment is obsolete.

Q. That is, at this late date, six or seven years later?

A. Yes.

Q. I presume since it is still in your sheds, it is your equipment? It doesn't belong to some one else?

A. It belongs to us.

Q. Did it belong to you in 1932?

A. Yes.

12472 Q. Mr. Varady, I believe I asked you as the last question what the value of this equipment was that you had to lay up and which you have not since had an opportunity to use, that is, which you had to lay up in 1932 as a result of this 15 cents per barrel that was placed on truck shipments of cement by the Universal-Atlas Company out of their Buffington plant. Will you please state the value of that equipment?

Mr. Leisure: I believe we have stated our objection to that question and that it was overruled.

Trial Examiner Norwood: Yes.

By Mr. MacIntyre:

Q. Will you please state the value of that equipment?

A. $100,000.00.

Q. Approximately $100,000.00?

A. Approximately $100,000.00.

Q. I believe you stated at the beginning of your examination this morning that you had trucked cement for a number of road contractors in the lower or south side of Cook County here. Will you please state how they are receiving their cement today, whether by truck or rail shipment?

A. They are receiving it by rail shipments.

Q. Can you, of your own knowledge, state whether or not they have rail shipments to their job sites or whether it has to be re-handled by truck from some railroad
12473 siding to the job site after it is shipped to them by rail?

A. Well, that is a hard question to answer. It all depends on where the job is and the type of business.

Q. Well, do you know of some jobs of these particular contractors for whom you did truck cement, some jobs of

theirs that were not located on the railroads, that had to be re-trucked, had to be re-handled by truck from some railroad siding to the job site? Can you state whether or not you, of your own knowledge, know of such jobs for some of these contractors for whom you have trucked?

A. Yes.

Q. That is shipped to them by rail and re-handled—

A. By truck.

Q. —by re-shipment by truck from the rail siding to the job site?

A. Yes?

Q. Mr. Varady, can you state, of your own knowledge, whether or not as a result of your experience in the trucking of cement that the consumers secured any economies or advantages of lower prices as a result of your trucking of cement as compared with the delivery of cement by rail to them, as under the present arrangement?

12474 A. Well, before this differential was brought out, we always trucked the cement for the paving contractor or the material dealer right to the job, and in case of bad storms or bad weather, rainy seasons, why, within an hour or two, why, they could stop the shipments and all the orders would be held up until the weather would clear up, and thus it would save them a lot of demurrage as against if the material was shipped by rail.

12476 Q. Will you please answer that question, Mr. Varady, as to whether or not your trucking rates were lower or higher, in any instance higher or lower than the rail rates on the shipments to the same place, at the same location?

A. In paving jobs where the cement or material came in by car and we would have to meet the freight rate price, why, we met it, but where the cement was delivered out on the job, they paid us a nickel a barrel more than the freight rate.

12477 For instance, if the freight rate to a certain place was 25 cents, if the job was along the railroad track they paid us the 25 cents a barrel, but if the job was out of town a mile or two, off the team track, they paid us a nickel a barrel more and they favored us with that business.

By Trial Examiner Norwood:

Q. Will you tell us, as a rule, whether you had to charge

less for delivery on the job than the customer would have had to pay by rail, plus any necessary delivery to the job from the cars?

A. Well, we never had to haul at less than the freight rate. We always got the freight rate.

Q. You got the full freight rate?

A. The full freight rate.

Q. Didn't you ever underbid the freight rate to get business?

A. We didn't have to.

Q. How?

A. We didn't have to. We had trailers that we left on the job, and we pulled two or three trailers to the job and they unloaded the trailers, and we picked up the empty trailers. We left our trailers and tarpaulins on the job.

Mr. Zimmerman: I can't hear the witness.

By Trial Examiner Norwood:

Q. Could you deliver on the job and did you deliver on the job cheaper than rail deliveries could have
12478 been delivered on the job—

A. Well, they always—

Q. (continuing) —where there was an extra cost of transporting from the cars to the job in trucks?

A. Well, as I said before, where the job was away from a railroad track, they paid us a nickel a barrel more for putting it on the job.

By Mr. McIntyre:

Q. Well, would you have hauled, in that instance, the cement from that railroad siding for a nickel a barrel, if they had had it shipped by rail that far?

12481 *Cross-Examination by Mr. Leisure.*

Q. Mr. Varady, just a moment ago I think the Examiner asked you if you ever underbid the railroads on a charge, and you said you didn't have to; is that correct?

A. Yes.

Q. That is, when you met their price, you didn't need to go below that?

A. No, we didn't.

Q. And you usually charged a higher price, didn't you?

12482 A. Yes.

Q. To meet the competition at times you quoted

a lower price which made it the same price as the railroad rate; isn't that true?

A. Yes.

12485 Q. Now, Mr. MacIntyre asked you a question about your income from the hauling of cement and your loss of business. I think you said in 1931 that you did a gross business of $55,000; is that correct?

A. Yes, that is right. That was for trucking of cement.

Q. Yes. Now, of course, that wasn't all clear profit, was it?

A. That is our net income. That was our gross revenue.

Q. That is your gross revenue. You don't mean it was net, do you? It was gross?

A. No, gross income.

12496 By Mr. Zimmerman:

Q. If I am mistaken, what was your charge when you hauled to Evanston?

A. 45 cents.

Q. When it was 45 cents, you then added 5 cents a barrel if it was beyond the rail end?

A. No, we had nothing to do, when we first started

12497 hauling cement, with the price of cement. We had no idea what the cement cost or selling price was.

Q. I am not talking about the selling price of cement. I am talking about your charge for hauling cement. When did you start putting on the 5 cents a barrel?

A. That was in 1931.

Q. And that went on wherever the haul was beyond the rail end?

A. Yes.

Q. No matter where the cement was delivered?

A. Well, no, not necessarily.

Q. I mean—

A. (continuing) We can only truck into a certain area to meet this freight rate. Outside of this forty or forty-five mile area it wasn't profitable to meet the freight rate.

Q. So that you really couldn't cover by trucking the entire Chicago area, could you?

A. Well, the Chicago area we could, but not outside the metropolitan area of Chicago.

12509 I. D. ROYAL resumed the stand and testified further as follows:

12511 (COM. EX. 2172 to 2188, inclusive, were offered and received in evidence.)

Direct Examination (resumed) by Mr. Wooden.

Q. Mr. Royal, I asked you a question yesterday with regard to an interview that you had with Mr. Tyler, president of the Dewey Portland Cement Company, with reference to the establishment of basing points at the Dewey mill of the Dewey Company and at Ada, Oklahoma.

A. Yes.

Q. Will you state what conversation you had with Mr. Tyer on that subject?

Mr. Leisure: Mr. Wooden, would you mind fixing the time and place of that again? I am not clear. It may be in the record, but I would like to be able to follow it.

By Mr. Wooden:

Q. All right, will you do that, Mr. Royal?

A. In an interview I had with Mr. Tyler, the president of the Dewey Company, in October, 1931, I—

Mr. Leisure: The place has not been identified.

12512 The Witness: Pardon?

Mr. Leisure: Could we have the place designated?

The Witness: At Kansas City. I inquired of him about the establishing of bases at various points in his mills selling territory. He told me of the Lehigh establishing a base at Dewey and Ada, Oklahoma, in connection with the Oklahoma bids of sometime in April, 1931, but he said these were staggered bids, that is, that they did not use Ada and Dewey as a base in all the destinations the Lehigh bid on, but their bids were substantially lower than the Iola base which had governed up to that time, amounting to a Dewey or Ada base of $1.00, and in some cases $1.01 or $1.02 or $1.03.

12513 By Mr. Wooden:

Q. Did you have any conversation with Mr. Tyler on that occasion concerning the subject of the establishment of base prices at mills where the concern that established them did not have a mill?

A. Yes.

Q. Will you state what the conversation was?

A. I asked Mr. Tyler about the practice of one mill establishing a base upon a competing mill and he said it is quite often the case that a mill had set a base on a town where there existed a competing mill, and without the mill establishing the basing point at the competing mill receiving any benefit therefrom by securing any larger volume of sales whatever.

Q. Now, in the course of your investigations did you call upon the North Western States Portland Cement Company of Mason City, Iowa?

A. Yes, I did.

Q. Will you state on what occasions you made such calls and what you did on each occasion?

A. I called on them in 1931, in 1933, and in 1936.

In 1933, I talked with Mr. MacDonald and Mr. Cabanis, both officials of the company, and undertook to get some information from them as to the details of their bids
12514 submitted to Illinois and Iowa for highway cement.

I asked them about base prices, and Mr. Cabanis said that the base had been raised at LaSalle, St. Louis, and Hannibal from a dollar to a dollar and a quarter a barrel.

Q. Are you speaking now of the Illinois highway bids of what time?

A. Illinois highway bids, yes.

Q. Of what date?

A. I believe 1930—well, between the last bid of 1931 and the first bid of 1932. No, that is—I will correct myself on that—that is between the last bids in 1932 and the first bids in 1933, the base prices at those three points had been raised.

Mr. Cabanis told of their submitting bids on 897,000 barrels to the Illinois Highway Department in 1933. They bid the same prices at each of the three lettings in 1933, for the reason that they had checked the base prices after the first letting and had found that there had been no change in base price; so they considered that the same prices were prevailing at all of the points bid on.

Q. Did you have any conversation with Mr. Cabanis in 1933 with reference to the method which he employed in making price quotations?

A. Yes.

Q. Will you state what the conversation was on both sides?

12515 A. Well, he said he took the price at the basing point which plus freight made the lowest price at the destination, and in that way arrived at the destination price.

Q. Did you make any inquiry from Mr. Cabanis as to whether that formula or that method, rather, of determining prices had been followed in the bidding on the Illinois bids of January 6th, 1932?

Mr. Leisure: Now, that question can be answered yes or no, Your Honor, it seems to me.

A. Yes, I did.

By Mr. Wooden:

Q. Will you state what the conversation was?

A. The officials of the North Western States Company told me that they—

Mr. Leisure: Now, I object unless the witness answers the question, and the answers are not responsive. He was asked what the conversation was, and the witness proceeds to sell one side of the conversation without saying one word about what he said.

Mr. Wooden: I asked him the conversation on both sides.

12516 Trial Examiner Norwood: Yes. Answer the question.

A. I asked them if they had bid the destination bids and made bids that all of the county seat destinations called for in the Illinois proposals. They told me that they had submitted bids on only 29 destinations, I think.

Q. Had you finished your answer, Mr. Royal?

A. I think so, yes, sir.

12517 Q. Did you have any conversation with Mr.
12518 Cabanis or Mr. MacDonald, I believe you named in the same connection, as to whether they had taken the lowest sum of the base price plus freight in bidding on the Illinois bids of January 6, 1932?

A. Well—

A. I don't recall that conversation.

By Mr. Wooden:

Q. You spoke of Mr. Cabanis stating that they made the same bids on the Illinois 1933 lettings?

A. Yes.

Q. Did you ascertain or did you have any conversation as to the reason for making the same bids on each of the 1933 lettings?

Mr. Leisure: I suppose that question means, did he have any conversation with Mr. Cabanis.

Mr. Wooden: Yes, that is right.

A. I did.

Trial Examiner Norwood: Your point is well taken.

By Mr. Wooden:

Q. What was the conversation on that point?

12519 A. He stated that they had checked the bids and the base prices prevailing after the first 1933 bids in Illinois, and that they had found there was no deviation from the base prices, and, therefore, they had assumed that there was no change in the bid prices—base prices, rather.

Q. Did you ascertain what prices they checked to ascertain that fact?

A. They said they checked the base prices at all basing points in their territory.

Q. Did you have any conversation with Mr. Cabanis or Mr. MacDonald in regard to any advance in the Mason City base price during 1932?

A. Yes.

Q. State what that conversation was?

A. I inquired about an advance at Mason City, the Mason City base price, and—

Mr. Leisure: Your Honor, we are getting an answer now on the record that he inquired about. From the form of the question we can't possibly know who the parties were to this conversation.

Trial Examiner Norwood: I think they were designated.

Mr. Leisure: He must have inquired from some one if he inquired and I—

The Witness: Well, I can very easily repeat the

12520 names.

Trial Examiner Norwood: Yes.

The Witness: I inquired from Mr. Cabanis,—Mr. MacDonald was there part of the time and not there part of the time—in regard to the base price increase at Mason City. Mr. Cabanis replied that there had been an increase of 25 cents between the latter part of 1932 and about the early part of the summer, 1933. I believe it was 25 cents. He said this increase in the Mason City base price was initiated by the Lehigh Company.

Q. Did you ask him whether his company followed those advances or not?

A. He said his company followed the advance and rarely if ever initiated any advances, but followed prices.

Q. Did you have any conversation with Mr. Cabanis with regard to any reasons why they did not submit bids on an f.o.b. mill basis to the Illinois Highway Department in 1933?

A. Yes, I did.

Q. What was the conversation?

A. I asked Mr. Cabanis why they didn't submit the bids as called for in the alternate of the Illinois Highway bid proposals on the basis of an f.o.b. mill price. Mr. Cabanis stated that the practice of bidding on a destination
12521 basis was of long standing and both he and Mr. MacDonald said that if a deviation was made from that practice it would disrupt the price situation.

Q. Did you have any conversation with Mr. Cabanis with regard to the differential on bulk cement?

A. Yes.

Q. What was that conversation?

A. I asked him about the reduction in the differential between the two, and he stated that there had been a differential of 10 cents a barrel; that is, that bulk cement had been 10 cents cheaper than cloth sacked cement, but that the differential was reduced to five cents.

Q. Did you ascertain from him when that took place?

A. I think it was—I think it was in August of 1932, if I remember rightly.

Q. Did you ascertain or ask him whether or not his company had made that change in the bulk differential?

A. He said they had made the change but they were only following the policy that was started by another company or other companies. He thought the company that initiated it was the Lehigh Company.

Q. Do I understand that you called upon Mr. Cabanis in 1936 as well as in '33 and also in '31?

A. Yes.

12522 Q. Did you see anyone else besides Mr. Cabanis in 1936?

A. I saw Mr. MacDonald.

Q. What was Mr. Cabanis' position and Mr. MacDonald's?

A. Mr. MacDonald is the general manager or was at that time, and Mr. Cabanis is general sales manager.

Q. Did you examine any files of the company, the

Northwestern States Company, at the time you were there in 1936?

A. Yes, I examined files of correspondence.

Q. Did you make any selections or obtain any copies?

A. I did.

Q. Who provided you with copies?

A. Mr. Cabanis.

The witness identified Com. Ex. 2191 as a copy of a letter from the Northwestern States' files, which was made for him by or under the direction of Mr. Cabanis, after witness had selected it from the files. The writer,
12523 Mr. Byfield, was a salesman for the company. The party to whom it was addressed, Mr. Pray, is one of the minor officials of the company in the general offices. The witness does not recall just what position he occupied.

Mr. Wooden: I offer this Exhibit 2191.

Trial Examiner Norwood: Is there any objection?

Mr. Leisure: We object to the document as being merely an inter-office communication, not binding on any of the other respondents, and if either of the parties to the document were on the stand they would not be able to tell us as to the contents of the document, being entirely hearsay, so we object to it as being incompetent, irrelevant and immaterial.

Mr. Wooden: I would agree to that statement, that neither of the parties could testify as to the contents.

Mr. Zimmerman: I have nothing to add.

Trial Examiner Norwood: May I see it?

(The document referred to was handed to the Trial Examiner.)

Trial Examiner Norwood: Tell me—I may have this a little bit confused—give me the background of this paper here marked 2191.

12524 Mr. Wooden: It is a copy of a paper furnished him by Mr. Cabanis, made from a document he found in the files.

Trial Examiner Norwood: Yes.

Mr. Wooden: And it is written by one of the salesmen of the company to Mr. Pray, who was one of the minor officials, so the witness says, of the company.

By Trial Examiner Norwood:

Q. Mr. Byfield was a salesman of this company?

A. He was a salesman.

Q. Who is Cutler-Magner Company? Did you find that out?

A. Cutler-Magner Company is a material con-
12525 cern operating at Duluth.

Q. And a competitor of this Northwestern States Company?

A. I don't know.

12526 (COM. EX. 2191 was offered and received in evidence.)

12528 The Witness: Mr. Wooden asked me in regard to the North Western States Cement Company's bid to the Illinois Highway Commission for the letting of January 6, 1932. I asked Mr. Cabanis about this, and he told me that they bid on 325,000 barrels of cement after having first determined on a mill net of 80 cents. He supplied the details of their bids.

By Mr. Wooden:

Q. Did you ascertain from Mr. Cabanis at that time whether that involved an adherence to or a departure from the method of quoting prices by use of basing points?

A. It, according to his statement, amounted to
12529 a divergence from the plan of bidding on a destination basis, but that in all other respects they made every effort to adhere to a basis of bidding f.o.b. destination.

Q. What are the papers I show you marked as Commission's Exhibits 2192-A and B, 2193, and 2194, for identification?

A. Exhibit 2192 is a copy of a schedule—

Mr. Leisure: If Your Honor pleases, I think the witness should be merely asked to identify the documents without paraphrasing them.

Trial Examiner Norwood: I think so. Just tell us where you got it.

A. Exhibit 2192 is a copy of a paper obtained from the files of the North Western States Portland Cement Company under the direction of Mr. Cabanis.

Q. Did you get any explanation from Mr. Cabanis as to what the paper was or related to?

A. Mr. Cabanis said that it listed the basing points and base prices as of the dates that are shown in the tabulation.

Q. What are the other papers? Where did they come from? What do you know about them as papers?

A. Exhibit 2193 is a copy of a letter dated March 18, 1935 which was obtained from the files of the North Western States Portland Cement Company under the direction of Mr. Cabanis.

12530 Q. The two papers that you have just described were furnished you by Mr. Cabanis or did you attend to the making of copies yourself, or how was it handled?

A. The originals were selected from the files by me and read over by Mr. Cabanis, and he furnished these copies.

Q. All right. Go ahead with your next number.

A. 2194 is a memorandum that was—the original of which was selected by me from the files of the North Western States Portland Cement Company under the direction of Mr. Cabanis, and Mr. Cabanis had the copy, which is marked "2194", made up for me.

12531 Mr. Leisure: May I ask the witness a question?

Trial Examiner Norwood: Certainly.

Examination on Voir Dire by Mr. Leisure.

Q. I am not clear what you said as to No. 2192-A. Is it one you asked for or is it one which you asked Mr. Cabanis to make up for you?

A. 2192-A and B, there is a second page of it.

Q. This (indicating) is a part of the same document?

A. That is part, yes, sir.

By Mr. Wooden:

Q. Oh, I didn't understand that. You asked him to make that up?

A. Yes.

Q. I thought they were papers that you found, that were in the files.

A. They are copies of papers I found in the files. Those are copies.

Mr. Wooden: I see.

By Mr. Leisure:

Q. Are 2193 and 2194 copies of papers you found in the files?

A. They are.

Q. Now, is this a copy, 2194, or did he give you the document that was in the file?

12532 (Handing document to witness.)

A. That is a copy of a document I found in the file, marked "Copy" and the notation which was in pencil on the original is made by typewriter on this copy.

Q. What part of it was in pencil on the original?

A. The part that is referred to as "Penciled notation", —"Ours mailed 3-21-36. Eff.—3-30-36."

Q. And 2193 is also a copy that was made after you had selected the original from the file, is that correct?

A. That is true.

Mr. Leisure: We have no objection, subject to checking with the original documents.

Trial Examiner Norwood: Any further objection?

Mr. Zimmerman: I have nothing to add.

(COM. EXS. 2192-A and B, 2193 and 2194 were offered and received in evidence.)

Direct Examination (Resumed) by Mr. Wooden.

Q. Mr. Royal, I am showing you papers marked, for identification, as Commission's Exhibit 2195-A and
12533 B. What do you know about those papers, as to their source?

(Handing document to witness.)

A. These were tabulations made — tabulations which were found in the files of the Northwestern States Portland Cement Company and supplied to me by Mr. Cabanis. These are the carbon copies that were in the files.

Q. Do you know what they relate to?

A. They relate to bids made to the Highway Commission of the State of Illinois.

Q. I note in faint pencil at the top "3-25-36". Do you know anything about that or whose notation that is?

A. I don't recognize that note, but these were attached to a number of similar exhibits which were selected from Mr. Cabanis' files at the same time.

12534 Mr. Wooden: I will offer this in evidence, No. 2195-A and B.

Trial Examiner Norwood: Any objection?

Mr. Leisure: No objection.

(COM. EX. 2195-A and B was offered and received in evidence.)

12536 A. Some of the other companies were Penn-Dixie, and I think the Universal-Atlas, the Missouri: I haven't the names in mind of the others.

Mr. Wooden: Your Honor, I will offer this Commission's Exhibit 2196, and in making the offer I will state that it is very similar to others that we have already in evidence, and I shouldn't think there would be any question about other companies having put out similar things about that time.

Trial Examiner Norwood: Any objection?

Mr. Leisure: No objection.

12537 (COM. EX. 2196 was offered and received in evidence.)

Q. Showing you papers marked as Commission's Exhibit 2197-A to F, inclusive, for identification, what can you tell us about those papers as to their source and origin, so far as you know, concerning the papers themselves without going into the substance?

A. It is a paper taken from the files of the North Western States Portland Cement Company under the direction of Mr. Cabanis, in November of 1936. It is the orig-

12538 inal office copy or paper taken from the files and supplied to me by Mr. Cabanis.

Q. Did you have any conversation with Mr. Cabanis regarding that paper?

A. I had a conversation with Mr. Cabanis about the paper and—

Q. Can you state what the conversation was?

A. He stated that it was a paper gotten up through an understanding with dealers as to which class of customers the manufacturers should sell and which class the dealer should be allowed to sell.

Q. Did you ask Mr. Cabanis as to whether he was present at the time any such understanding was entered into?

A. I asked Mr. Cabanis more in regard to the occasion for getting up this statement, and I was told by him that there was a meeting of dealers at which certain representatives of the cement manufacturers were present, and that this schedule was adopted as one of the results of that meeting. I am not clear as to whether Mr. Cabanis said he was present at that meeting or not.

12543 (COM. EX. 2197-A to F, inclusive, was offered and received in evidence.)

Q. I understand, Mr. Royal, that you also called on Mr. Cabanis in 1931, in the course of your investigation as to cement?

A. That is true.

By Trial Examiner Norwood:

Q. In connection with this exhibit, 2197-A to F, did he say that they followed that policy set down in that paper? What did he say about that?

A. He said that was the policy that was used in
12544 marketing cement.

By Mr. Wooden:

Q. I am showing you papers now, Mr. Royal,
12545 marked, for identification, as Commission's Exhibits 2198, 2199 and 2200. Can you tell us where those papers came from?

(Handing documents to witness)

A. These are photostatic copies of papers selected from the correspondence files of the Northwestern States Portland Cement Company in October or November of—in October it was, of 1931.

Q. Selected by whom?

A. By myself.

12546 *Examination on Voir Dire by Mr. Leisure.*

Q. Commission's Exhibit 2198, for identification, Mr. Royal, has some writing on the side. Do you know anything about that or in whose handwriting it is?

A. That was on there when I selected the paper from the files, on the original.

Q. Do you know whose handwriting it is?

A. Well, I could make a very good guess, but I don't absolutely know.

Q. Well, I asked you if you knew.

A. Not absolutely.

Mr. Wooden: I will save you the trouble by excluding that from the offer. I didn't intend to include it in the offer.

Trail Examiner Norwood: What is it?

Mr. Leisure: It is Exhibit 2198.

Mr. Wooden: I mean, excluding the handwritten portions of the paper, not the whole paper.

12549 (COM. EXS. 2198, 2199 and 2200 were offered and received in evidence.)

By Mr. Wooden:

Q. Mr. Royal, do you remember having an interview at any time with the president of the North Western States Portland Cement Company?

A. Yes.
Q. Who was he?
A. Hanford MacNider.
Q. When did you interview him?
A. That was in the fall of 1936.
Q. Did you have any conversation with Mr. Mac-
12550 Nider regarding any differential between base prices at Mason City and elsewhere?
A. Well, Mr. MacNider said that there had been a base at Mason City for a great many years, and that the establishing of prices at Mason City, that is, the base price there was usually done by the Lehigh Company.
Q. Are the papers that I show you marked 2201-A and B a report of your interview with Mr. MacNider?
A. Yes, it is.
Q. With that before you, do you wish to repeat your testimony about the data for the interview you mentioned before?
A. This report relates to an interview I had with Mr. MacNider on June 19, 1933, and it includes his statement in regard to the question you asked.
Q. I asked if you had any conversation with Mr. MacNider regarding a differential between the Mason City price and other base prices.
A. I did.
12551 Q. Can you now state what that conversation was?
12552 A. Mr. MacNider said the custom had grown up in the industry to allow Mason City a 15 cent differential over LaSalle, and that that differential was being used at that time.
By Mr. Wooden:
Q. Did you inquire into the reasons for or the basis of that 15 cent differential?
A. I did.
Q. What did he say?
A. Mr. MacNider said that it was due to the difference in the fuel cost, but that Mason City was now using natural gas, which was piped from the southwestern fields.
Q. Did you have any conversation with Mr. MacNider as to the policy of his company in initiating price changes?
A. I did. At this time and I had also in 1936, which was the time I referred to before which I thought was under discussion. Mr. MacNider said that it was not the

custom of his company to initiate price changes but that they always followed the lead of the Lehigh Company.

12553 Mr. Wooden: With reference to the paper which is marked 2196 and received under that number, I call attention to Exhibit 1907, which was a circular of the Northwestern States Portland Cement Company, identified by the witness Hansen,—

By Mr. Wooden:

Q. —and I will ask Mr. Royal, showing him Exhibit 1907, what he knows about that paper.

(Handing document to witness)

A. Exhibit 1907 is a paper obtained from the files of the Northwestern States Portland Cement Company in the fall of 1936 under the direction of Mr. Cabanis. It is the original paper.

12554 HAROLD S. CREE was thereupon recalled as a witness for the Commission and, having been previously duly sworn, testified as follows:

Direction Examination by Mr. Wooden.

Q. Mr. Cree, I am showing you a paper marked 2202, for identification. Can you tell me what the paper is and where you have seen it before, if you have?

(Handing document to witness)

A. Well, this represents a memorandum of a trucking plan.

Q. Yes, but where did the paper itself come from, if you know?

A. And the paper was either sent to me or given to me at the time of the particular meeting when this plan was originated.

Q. Did you attend that meeting?

A. I did.

Q. Where and when was it held?

A. It was a meeting held in Chicago. The date here says, as of March 12, 1935, and I believe it was held at the Lehigh office.

12555 Q. Who else attended it, that you can recall?

A. Well, there were various mills there, the different representatives. I don't know as I can recall all of

them or any of them, but, of course, there was Lehigh and the Aetna Company, I represented them, and the Huron Company, and Universal, and Atlas—

Q. Can you name individuals—

A. —and the Marquette Company.

Q. (continuing) —instead of companies?

A. Well, I was there and Rooney of the Huron Company was there, Colburn of the Marquette was there. Then there was a gentleman named Hughes, I believe, of Lehigh.

Q. Hughes?

A. Hughes, and Lucas of the Petoskey, he was there.

Q. Do you remember anyone from the Universal?

A. I can't distinctly remember who did represent the Universal.

Q. Do you know how the paper itself came into your possession?

A. Well, either that it was given to me there at that particular time or it was sent to me later, see.

Q. You say that was some kind of a trucking plan?

A. It was a trucking plan to be used as a basis of operation in the Wisconsin district.

Q. Was it used?

12556 A. I believe it was.

Q. Was it used by your company?

A. Finally we followed this plan, if I remember.

Q. What do you mean by "finally"? Explain what you mean by "finally" you did?

A. Well, we finally filed with The Cement Institute this plan of trucking. Previous to that we had been trucking cement in the Upper Peninsula and to points beyond these designated, county lines.

Q. I notice on the paper two words in handwriting. Do you know whose handwriting that is?

A. Well, that is my scribbling there, and that represents the names of two counties, Brown and Kewana.

Q. Why did you put those names on there in your handwriting?

A. Well, I believe, Mr. Wooden, that filled in that particular picture of the zone of trucking.

12557 (COM. EX. 2202 was offered and received in evidence.)

Q. I will show you a paper marked 2203, for identification.

Q. (continuing) What is that paper, as to its origin and source, can you tell us?

A. Well, this is a notice that you sent to us.

Q. Meaning who when you say "us"?

A. Sent to the Aetna Cement Company.

12559 By Trial Examiner Norwood:

Q. Whose statement is it and where did you get it?

A. I am under the impression that this document, which speaks for itself, it doesn't mean much, was sent by the Universal Company.

By Mr. Wooden:

Q. What is the ground for your belief that it was sent by the Universal Company?

A. Well, it was the criticism that I had heard that had originated from that particular company.

Q. Did you receive it by mail?

12560 A. I am under the impression that we did. I can't tell you.

By Trial Examiner Norwood:

Q. Do you know where you got that paper?

A. Do I know where I got it?

Q. Yes, sir.

A. Well, I know where I got the criticism from.

Q. No, no, where you got that paper?

A. Well, I can't tell you definitely, Judge, that I know; there is nothing on it, only that I think I got it from the Universal.

Q. Well, if you got some criticism from one of these respondents about anything that is relevant and material in this case, you may state it verbally. The question now is: Was this paper, or such a one as may be received in evidence, the question now is what that paper is and where you got it.

A. Well, I couldn't definitely say that I got it from the Universal Company, whether they sent it to me or not, but I am under the definite impression in my own mind that they did, because I remember that particular minute criticism on their part.

12561 By Mr. Wooden:

Q. You mean, made direct to you and orally?

A. Orally.

By Trial Examiner Norwood:

Q. Well, where did this paper come from?

A. Well, I think it came from the Universal Company, sent to me.

Q. Well, was it found in your files?

A. Oh, yes, yes, one of the many papers.

By Mr. Wooden:

Q. Is this one of the papers from the files of the Aetna Company?

A. Yes.

Q. Did you handle it at the time as a part of the business of the Aetna Company?

A. Yes, those (indicating) are all my remarks.

12562 Q. Are all of the handwritten pencil notes on it in your handwriting?

A. Yes.

Q. When were they placed there?

A. At the particular period of the date of that letter.

Mr. Wooden: I will offer this Commission's Exhibit 2203 at this time, your Honor.

Trial Examiner Norwood: Let me see it.

(Commission's Exhibit 2203, for identification, was handed to the Trial Examiner.)

Mr. Wooden: It appears to be another one of those anonymous—

Trial Examiner Norwood: This might be received if it is purported to come from any of these respondents or had gone to any of them, but the identification is practically nil on it.

Mr. Wooden: Your Honor, we have had testimony here prior to this time that memoranda of an anonymous character were circulated in the trade.

Trial Examiner Norwood: Yes, but he wouldn't say that he received it through the mail.

Mr. Wooden: He says that to his best recollection and belief he did.

12563 Trial Examiner Norwood: That he received this through the mail?

Mr. Wooden: To shut out the documents like that under the circumstances, your Honor, would be simply to fall in line with what respondents have done to make it difficult to get evidence against them.

Trial Examiner Norwood: Well, if you will show that it came to him, if he knows anything definite about it, I will consider it.

Are there any objections to it?

Mr. Leisure: Yes, I am objecting to it. I object to counsel's remark about what respondents have done, and I object to his procedure, particularly as to trying to show by this witness before when he was on the stand that The Cement Institute sent out anonymous letters, and I think he knows they never did such a thing.

Mr. Wooden: I do not—

Mr. Leisure: To get this witness to swear to it. And I object to the remarks of counsel today—

Mr. Wooden: I object just as well—

Trial Examiner Norwood: One at a time.

Mr. Leisure: —that respondents did send these out anonymously in this way.

Trial Examiner Norwood: I think that there is testimony here that anonymous letters and anonymous price lists, or something like that, were received, but
12564 I wouldn't say anonymous. They had the cards of the people but they were not signed.

Mr. Leisure: That is another thing.

Mr. Wooden: It is the same—

12565 *Voir Dire Examination by Mr. Leisure.*

The witness identified Com. Ex. 2203 as one of the papers that was in his office files at Aetna when he was employed by that Company and that it had got there the same way the rest of them. Those were papers which had been at his home that he had turned over to the Commission.

Mr. Leisure: Well, your Honor, we object to it as being incompetent, irrelevant and immaterial, and as not having any probative value and not being binding on any of the respondents. It has not been identified to bring it home to any respondent in this case.

The witness says he thinks and he has an idea that it came from a certain source, but, of course, the
12566 witness might be mistaken about that, and we feel that whatever probative value it might have, and I can't see any that it has, should be sufficiently connected up with any respondent to allow it to be offered in evidence.

Trial Examiner Norwood: Any further objections?

Mr. Zimmerman: I have nothing to add.

Mr. Wooden: I want to ask a question before you rule on it, your Honor.

Trial Examiner Norwood: Did the Aetna Company do anything pursuant to that; that is, on receipt of that paper, did they do anything about it?

Mr. Wooden: That was my next question.

The Witness: Well, I took it up with our Green Bay representative at that particular time. The paper dwells upon, I believe, the first paragraph, about an operation at Green Bay, Wisconsin, where we had our big warehouse in that particular district doing trucking from that warehouse to points in Wisconsin, and this is a little minute criticism of our trucking operation regarding the delivery or unloading of ten barrels of cement, or something like that.

Trial Examiner Norwood: And you investigated that?

The Witness: Yes.

Trial Examiner Norwood: And did you report 12567 about it to somebody?

The Witness: Well, I think I just kind of ignored the thing after I investigated, that there wasn't much to it.

Mr. Wooden: I had a question somewhat similar to that, but possibly more specific.

Direct Examination (Resumed) by Mr. Wooden.

Q. Upon or after receipt of that paper, did you modify your prices according to the suggestion made in that paper?

A. Prices?

Q. Let me show you.

Trial Examiner Norwood: Practices.

The Witness: No, prices. There are two paragraphs there, I believe.

By Mr. Wooden:

Q. I am referring to the second paragraph now.

A. Well, this notation I put down here about Mr. Rooney of the Huron Company. It seems there was a differential of 4 cents a barrel relative to a freight rate extra charge, and I believe on investigation we found out that he had not come up with that price, and so we didn't go up with the price, if I remember correctly. I would imagine that finally that the prices were filed on the higher basis. I don't—I can't recall definitely.

12568 Q. I notice the language there of "Rooney had not agreed to apply surcharge." Is that your writing?

A. That is my writing, yes.

Q. Placed on there at the time?

A. Yes.

Q. This writing here, "Universal agrees—"

A. What I say Rooney had not agreed to apply surcharge, I probably had reference to the fact that he had not filed this extra 4 cents and was not in agreement with the higher price at that time; see.

Q. Well, did you later on advance your price by the 4 cent surcharge?

A. I imagine we did.

Q. This pencil notation at the lefthand side of the first paragraph, what is that? Is that your writing?

A. Yes, it is.

Q. What is it?

A. It speaks something about Universal.

Q. Well, just read it.

A. "Universal—"

Mr. Leisure: Well, now, I would rather he wouldn't continue reading from it. After a while there won't be any need to object to the exhibit.

Trial Examiner Norwood: I think he can read that writing he put on there himself.

12569 Mr. Leisure: He can read it without reading it on the record, your Honor. I don't see why he has to read it on the record.

Mr. Wooden: Well, all right. I will cease and desist.

Trial Examiner Norwood: Let me see it.

(A paper writing was handed to the Trial Examiner.)

Trial Examiner Norwood: This came from the files of one of the respondents?

Mr. Wooden: The Aetna Portland Cement Company.

Trial Examiner Norwood: And it is in the writing of one of the officers of respondents?

Mr. Wooden: This witness, who was then sales manager.

Trial Examiner Norwood: The objection is overruled, and it is received as marked.

(COM. EX. 2203 was offered and received in evidence.)

By Mr. Wooden:

Q. Now, will you read that handwriting of yours on the lefthand margin?

A. "The Universal agreed to pay trucking."

Q. Will you explain why you put that on there?

A. Well, as I would recall this, Mr. Wooden,
12570 this is information that I jotted down here after having received that particular information from the manager of our Green Bay warehouse who knew about the details, which I didn't.

Q. The words "Northern Coal & Supply Company" written at the top in your writing, what does that mean?

A. Well, that evidently means that they were associated with that particular operation or that job at that time.

12571 The witness identified Com. Ex. 2204 as a page of a statement or a letter that he got out describing certain conditions existing in the cement business as
12572 relative to "our" interest in the competition, particularly at that time. He wrote what is on "that paper" to the late Mr. Lingeman, as a matter of record, keeping a copy for himself, and sending one on to Mr. Johnson. The witness thinks that the paper was written some time in 1935. He doesn't know anything about the whereabouts of the remainder of the document of which this appears to be page number 5, unless Mr. Johnson has one. The witness knows he had the whole complete thing. He remembers that particular statement.

12573 *Examination on Voir Dire by Mr. Leisure.*

Q. Mr. Cree, was this the end of the document, do you know, or did it go on beyond the fifth page?

A. No, that was evidently the end.

Q. That was the end?

A. Yes, I think so.

Q. And there were four preceding pages, were there, when you wrote it?

A. As I recollect, there were, yes.

Mr. Leisure: Your honor, we object to this document as being incompetent, irrelevant and immaterial. Here is the fifth page of a document being offered in evidence in the case, without being connected with any of the issues in any way. It has no more probative force than if you took a page from Webster's Dictionary and offered it in evi-
dence. The first line says, "and hoping that it might
12574 be like a little child to lead them on, but it is our conclusion now that the cement business", and so

on. These are conclusions stated by this witness at that time, which are not binding on any of the respondents. He might have written a text book at that time.

By Trial Examiner Norwood:

Q. Can you refresh your memory from that document and testify independently as to the statements contained in that postscript?

A. Why, yes.

Trial Examiner Norwood: I think you had better do that.

Mr. Smith: Did the witness state whether it was received by him?

Trial Examiner Norwood: He testified that it was 12575 written by him to Mr. Lingeman.

The Witness: Those are my thoughts, Mr. Smith, at the time on the cement industry as pertaining to our competition, and written in the best interests of the company, for their own protection, for our own analysis.

Mr. Leisure: I submit that the witness' own statement shows the immateriality, his opinion of the cement industry which he wrote at the time.

Trial Examiner Norwood: I know they may have an opinion, but it has some statements there, and I think counsel for the Commission has a right to bring them out, but if the paper is objected to, I think the witness should be called on to testify to it independently of the paper, after refreshing his memory from the paper if it is necessary.

12577 *Direct Examination (resumed) by Mr. Wooden.*

Q. Mr. Cree, is it a fact, as you stated in this paper, No. 2204, that you agreed to discontinue the trucking of cement in the Upper Peninsula?

A. We did, yes, we agreed to that, to discontinue.

Q. Is it a fact that—

Trial Examiner Norwood: Well, just a moment. Read that question, please?

(Question and answer read)

By Trial Examiner Norwood:

Q. Whom did you agree with?

A. Well, that, Judge, that is a matter of previous testimony; I think that memorandum thing about the filing of an agreement of discontinuance—

By Mr. Wooden:

Q. Was that in October, 1935?

Trial Examiner Norwood: You have already told us about that, have you?

The Witness: Yes, that has been stated before, I think, in previous testimony.

12578 Q. Why did you agree to discontinue the trucking of cement in the Upper Peninsula?

12579 A. Well, on account of the fact that I was presented with a memorandum that Cronkrite of Universal got from Mr. Johnson, saying that we were to not continue trucking in the Upper Peninsula. Auto-
12580 matically, I followed those instructions; couldn't do anything else.

By Mr. Wooden:

Q. Do you know anything about any claim or whether there was any claim by your competitors that they couldn't meet your competition in trucking in the Upper Peninsula?

A. Well, that was thrown at us all the time, that they couldn't meet that competition, and my argument was that that was their business and not our business, and if we had a location which we considered a key location at the Sioux and one at Menominee, why, we should have the privilege of operating our boats and trucking from those locations.

12581 Q. Will you state whether or not it is a fact that the Aetna Company waived any advantages it had in the delivery of cement by boats and trucks?

A. It certainly did. In my opinion, it certainly did.

Q. And in whose favor did it waive those advantages?

A. To those who choose not to compete in that way, because probably they couldn't or who didn't want to.

12582 Q. After you gave up trucking in the upper peninsula, was there any reflection on the price of cement in other districts?

A. Well, I can't remember other districts, but I remember right up in the upper peninsula there was a reflection downward later on in the price of cement up there.

By Mr. Wooden:

Q. What company or companies doing business in the upper peninsula received the benefit of your discontinuing trucking up there?

A. Well, the Huron Company and the Petoskey Company and the Universal.

Mr. Wooden: Your Honor, I again insist that the 12583 document, Commission's Exhibit 2204, is admissible.

Trial Examiner Norwood: Do the gentlemen continue to object?

Mr. Leisure: Yes.

Trial Examiner Norwood: Objection sustained. Go ahead.

By Mr. Wooden:

Q. Now, Mr. Cree, I am showing you a paper marked 2205, for identification. Can you tell us what that paper is as to its origin and source?

A. Well, this is part of a memorandum similar in respect to the other one. It is a general statement as to the cement business at that particular time for our own analysis.

Q. Do you mean to say that you wrote that?

A. Yes, I did.

Q. Can you say to whom?

A. To Mr. Lingemann and to Mr. Johnston.

Q. Can you state—

A. Mr. Johnston has copies of all these things. He has a copy of that other one. He showed it to me in Chicago.

Q. When?

A. About three years ago.

Q. This Commission's Exhibit No. 2205, can you say about when it was written by reference to the contents to refresh your recollection or in any way that you can fix the time?

12584 A. I think this was written about the same period, if I remember, and I think I do, that I wrote two of these darn things about that same period. I don't think they were hardly a week or ten days apart. Now, maybe I am wrong. I haven't read that, but I recall. I think I am right.

Mr. Wooden: Again, your honor, I offer Commission's Exhibit 2205, which is page 2, and make the statement that the other portion of the document is not available among the papers that Mr. Cree produces.

Trial Examiner Norwood: Have you already given the substance of this in your former evidence?

The Witness: Well, I don't know.

Trial Examiner Norwood: Well, look it over and see if you think you haven't covered that.

Mr. Wooden: No, there are some portions in it that I am sure he has not covered.

The Witness: No, right here it says "If the Aetna Company—"?

Trial Examiner Norwood: Wait a minute.

The Witness: Pardon me. All right.

Trial Examiner Norwood: Don't read it for the record.

The Witness: Pardon me.

No. This ought to be in there if the rest of it is in there because—

12585 Trial Examiner Norwood: You mean the other part of this document is already in evidence?

The Witness: No, not that I know of.

Trial Examiner Norwood: Is there anything you see here that you have not testified to heretofore? Are you able to refresh your memory here and testify to it independently?

The Witness: Oh, yes.

Trial Examiner Norwood: I think you had better put it that way unless they don't object.

ings if counsel wants it to go that way.

Trial Examiner Norwood: It will shorten the proceedings if counsel want it to go in that way.

Any objections?

Mr. Leisure: We make the same objection we made to the preceding exhibit without taking the time to state it over again. It is merely a statement by this witness in which he sits down and writes his conclusions at that time.

Trial Examiner Norwood: Does the Commission counsel make any point about this being received by Mr. Johnston and acted upon or is it connected in any way by other evidence?

Mr. Wooden: I say it is connected up by other evidence, your Honor.

12586 Trial Examiner Norwood: I mean, is there any reliance whatsoever on the fact that it was written, that it was a written communication to this man especially or anything like that?

Mr. Wooden: Yes, there is. I am offering the document itself as the written statement of the witness made by him in the ordinary course of his business acting as a

sales manager for the Aetna Company and to the heads, responsible heads of that company, that company being a respondent in the case.

Mr. Leisure: Plainly, in reading it, it is not in the nature of a report. It is a statement of his opinions, of his own conclusions.

Trial Examiner Norwood: Well, he has stated it was a report. I think the facts named in there about which he has testified he can state independently on the stand, I think he had better do it that way.

Mr. Wooden: Well, I will do that, your Honor, but I am nevertheless insisting that the paper itself is competent and admissible.

Trial Examiner Norwood: Yes, go ahead. Objection sustained.

Proceed.

By Mr. Wooden:

Q. Will you look at Commission's Exhibit 2205, 12587 for identification, Mr. Cree, and tell us if there was anything in the competitive situation at Milwaukee that you would characterize as sheep-running and following the leader?

Mr. Leisure: Now, that brings on the very point of my objection with this exhibit. Of what possible benefit is it to this proceeding to have this witness tell us whether or not there was anything in the cement industry which he would characterize as sheep-running?

Trial Examiner Norwood: Objection sustained.

By Mr Wooden:

Q. Was there anything in the competitive situation at Milwaukee that you ever did characterize to your superiors as sheep-running and following the leader?

Mr. Leisure: The same objection.

Trial Examiner Norwood: Sustained.

Mr. Wooden: Your Honor, I can't see why the witness can't tell what he did.

Trial Examiner Norwood: He may state any material statements contained in that paper which he can testify to independently or after refreshing his memory from the paper. He may put that in. Whether or not he called such things sheep-running or not is not material.

Mr. Wooden: I don't see why—you don't think the

question of following a leader in the industry is
12588 material either?

Trial Examiner Norwood: Yes, about following the leader, and what the leaders were.

Mr. Wooden: That is the same thing as sheep-running, I judge.

By Mr. Wooden:

Q. Did you, Mr. Cree, propose to your superiors in your company that your company maintain the definite destination price in their competition with other cement mills?

A. Well, wherever we built up our operation as to shipment of cement, we always had enough pride in our operation and pride in the quality of the cement that we didn't have to at all times go out and sell below what was the so-called destination or going price.

Q. Well, now, that is not quite an answer to my question. I asked your if you proposed that you maintain a definite destination price. Did you make that proposal to the heads of your company?

A. Well, I imagine I did. That would shut out any criticism from competitors then.

Q. Did you make that proposal in the paper marked as Commission's Exhibit 2205, for identification?

A. Yes.

Mr. Zimmerman: How are we to determine from this witness' testimony how much is imagination and
12589 how much is fact, when he answers the question in the fashion that he did?

Mr. Wooden: You can try to find out on cross-examination.

Trial Examiner Norwood: Go ahead.

By Mr. Wooden:

Q. Did you ever while with the Aetna Company choke your operation of distribution?

A. Not that I know of. We are on the other extreme, I believe.

Q. Was any one proposing or insisting that you choke your operation of distribution?

Mr. Leisure: I want to object to that unless it is shown that it was some one that had to do with this case. Some one else might have proposed it and if might not be material.

Trial Examiner Norwood: Did any of your competitors propose that you restrict your distribution in any way?

The Witness: It is a matter of record in the previous testimony, Judge, that that is so, that they did.

By Mr. Wooden:

12590 Q. Did you make a report of that to your superior officers?

A. I did.

Q. Did you do it in this paper marked as Commission's Exhibit 2205?

Trial Examiner Norwood: Well, I—

Mr. Leisure: I object to that, whether he did or not in this paper being not material.

Trial Examiner Norwood: Sustained.

By Mr. Wooden:

Q. By reference to Commission's Exhibit 2205, for identification, and to the fourth and fifth and sixth paragraphs, does that enable you to fix approximately the time that you wrote that paper?

A. Well, I think this paper was written approximately the same time that that previous little notation was written. I think there was only just a few days' difference. I think they were written in December.

Q. By reference to the proposed Code, does that help you any or proposed curtailment plan?

A. You mean as to the fixing of the date?

Q. Yes.

A. Well I think—

Mr. Leisure: The witness has already fixed the date.

The Witness: Approximately three years ago, or

12951 a little more.

Mr. Wooden: Well, all right.

Your Honor, I again insist that the paper itself, Commission's Exhibit 2205, for identification, is competent.

Mr. Leisure: The same objection.

Trial Examiner Norwood: Objection sustained. Go ahead.

Mr. Wooden: Number these two, please.

(The two purported letters above referred to were thereupon marked for identification as Commission's Exhibits 2206 and 2207.)

By Mr. Wooden:

Q. What are the papers I hand you, Mr. Cree, marked as Commission's Exhibits 2206 and 2207, for identification?

A. These are two trade letters as to the distribution of cement.

Q. Whose trade letters?

A. Well, these were gotten out by the Aetna Company.

Trial Examiner Norwood: Who were they sent to?

The Witness: To the trade in general.

Trial Examiner Norwood: Your customers.

The Witness: Yes.

Trial Examiner Norwood: And to competitors? Did you send any of them to competitors?

12592 The Witness: No, not that I remember, no.

Mr. Wooden: I am not offering these two at the present time, your Honor. I am not sure whether there are duplicates already in the record or not. It would depend upon that whether they are offered, those announcements to dealers that came out in the winter and spring of 1935.

Number that, please.

(The document above referred to was thereupon marked for identification as Commission's Exhibit No. 2208.)

By Mr. Wooden:

Q. What is the paper I show you marked as Commission's Exhibit 2208, for identification?

A. That is a plan of trucking that was sent out by our company, I believe.

Q. Can you determine the date on it?

A. This is a copy, a copy of the thing.

Q. Can you fix the date of it?

A. No, I can't. I don't know whether that was really sent out or not. That might have been just a feeler.

Mr. Wooden: I will offer Commission's Exhibit 2208 with the witness' explanation.

12593 Trial Examiner Norwood: Any objection?

Mr. Leisure: Yes; we object to it, incompetent, irrelevant, and immaterial, no showing that it was brought home to any of the respondents in any way or even used by this company.

Trial Examiner Norwood: Any further objections?

Mr. Zimmerman: I don't think we are interested.

Trial Examiner Norwood: Let me see it just a minute.

Mr. Leisure: I want to point out to your Honor that it is not dated and the witness said that he cannot say that it was sent out.

Trial Examiner Norwood: Did you state when you followed this plan?

The Witness: That plan was never followed, Judge. It was just a date,—that was written I can't remember when.

Trial Examiner Norwood: What did you do with it?

The Witness: I didn't do anything about it.

By Mr. Wooden:

Q. Was that your proposal for a plan, or what?

12594 A. That I believe was one of our own proposals for a plan. I had two or three at that time, at that particular time. I don't know just when it was.

Q. Did you submit that proposal to any of your competitors?

Mr. Leisure: The witness has already answered that. He said that he couldn't say.

Trial Examiner Norwood: He said he couldn't say.

The Witness: No, I can't remember that; no.

Trial Examiner Norwood: Yes. Objection sustained.

Mr. Wooden: Your Honor, I submit that the paper is admissible just for what the witness said it was, and for no more at the present time.

The Witness: It might have been sent out. I don't remember whether I sent it out or not.

Mr. Wooden: It may tie up with some other exhibits in the case.

Trial Examiner Norwood: Well, you have it marked there, and I shall only be too glad to take it in if it appears to be useful in any way whatsoever.

12595 The witness identified Com. Ex. 2209 as a letter he received from Mr. "Johnston" (Johnson), president of his company, the Aetna Company.

Mr. Wooden: I offer Commission's Exhibit 2209.

12596 Trial Examiner Norwood: Any objection?

By Mr. Leisure:

Q. Is this your handwriting, Mr. Gree, on the side? (Handing document to witness)

A. Yes, I think that is. It is kind of scribbling. My handwriting varies now and then, but I think that is mine.

The Witness: May I ask a question?

Trial Examiner Norwood: No, not now. We are deciding about this paper. Any objection?

Mr. Leisure: No objection, except that it be received as binding on the Aetna Company alone.

Trial Examiner Norwood: Any further objections?
(No response)
Trial Examiner Norwood: Received as marked, 2209.
(COM. EX. 2209 was offered and received in evidence.)
The witness identified Com. Ex. 2210 to 2215 inclusive as original letters received from some of the Aetna
12597 dealers, representing a few of the many letters of this particular nature that were received at that time in reply to a letter that he had sent out, asking them their opinion as to "our" kind of trucking, as to serving them Aetna cement.
The witness identified Com. Ex. 2216 as a trade announcement gotten out by and sent out by the Petoskey Cement Sales Company. That paper was among the papers in the files of the Aetna Company.
Mr. Wooden: I offer 2216, excluding any pencil writings.
Trial Examiner Norwood: Let me look at that.
(The document referred to was handed to the Trial Examiner.)
12598 Trial Examiner Norwood: Any objection?
May I ask him about 2216, your honor?
Trial Examiner Norwood: Certainly.
12600 Trial Examiner Norwood: Go ahead, Mr. Wooden.
Oh, is there any objection to that Exhibit 2216?
Mr. Leisure: No, we have no objection.
(COM. EX. 2216 was offered and received in evidence.)
The witness identified Com. Ex. 2217 as a letter received in the ordinary course of mail from a dealer of "ours" who complained—; it was part of the files of the Aetna Company.
12603 By Trial Examiner Norwood:
Q. Well, Mr. Witness, is the McCall Lumber and Coal Company of Ferndale, was it one of Aetna's customers?
A. Oh, yes; yes.
Mr. Wooden: That is what the complaint was about, that very transaction as shown in the other exhibits.
Mr. Leisure: There are two points to my objection. The first is unless the witness was personally present and saw the writer write it, he cannot say of his own knowledge that the man wrote it.
Trial Examiner Norwood: No, but he said it was received by Aetna in the due course of business.

By Trial Examiner Norwood:

Q. Didn't you say that?

A. Yes, sir.

Mr. Leisure: But he can't say the author of the letter was who it is purported to be.

12604 Trial Examiner Norwood: Well, I know this ties in with the exhibits I have read there, about this matter of dealers and the dealers' margins.

Mr. Wooden: The very transaction of 800 barrels shipped or quoted at Greenville, Michigan, by this McCall Lumber Company is the substance of 42-E, Exhibit 42-E.

(COM. EX. 2217 was offered and received in evidence.)

12605 The witness identified Com. Ex. 2218 and 2219 as quotation blanks of the Alpha Cement Company and the Petoskey Cement Company.

By Mr. Wooden:

Q. How did they come into your possession?

12606 A. Well, it was quite customary for friendly dealers to send me quotations or any hint of some price that they might get, so this particular friend of mine sent these in to me, that is all.

Q. Were they—

A. (continuing) That is a long time ago.

Q. —a part of the files of the Aetna Company?

A. They were.

Mr. Wooden: I will offer those two papers in evidence, with particular reference to the paragraph that is printed, with the other printing on the back of each paper.

Trial Examiner Norwood: Which paragraph, the third one?

Mr. Wooden: Marked in red on the outside margin.

By Trial Examiner Norwood:

Q. This was sent to you by one of your customers, one of your dealers?

A. Yes.

Q. A dealer to which the quotations were addressed?

A. Yes.

12607 Mr. Leisure: No objection.

Trial Examiner Norwood: Any objection?

Mr. Leisure: No. I think they are very remote. They go back to 1925. I don't see that they have very much probative force.

(COM. EXS. 2218 and 2219 were offered and received in evidence.)

By Mr. Wooden:

Q. Mr. Cree, referring to your testimony in Cleveland concerning the conversation which I understood you heard between Mr. Johnston and Mr. Jennings regarding paying back or a reimbursement or whatever you want to call it of 9,000 barrels of cement which Wabash complained Aetna had taken—do you remember what I am referring to?

A. Yes, I remember.

Q. Can you state whether or not anything was said during that conversation between Mr. Jennings and Mr. Johnston about the Bay City base?

A. Well, Jennings came over to our office—

Q. Can you answer the question, first?

A. About the Bay City base?

Q. Yes.

A. Well, on the consummation of the agreement
12608 to pay back some 8,000 barrels, which was such a silly thing, in the first place—it was really pitiful—why the price of cement went up 15 cents a barrel.

Trial Examiner Norwood: Can't you answer that yes or no whether you know that or not?

A. Yes, something was said of it.

By Mr. Wooden:

Q. Well, now, tell us what was said.

A. Well, the—it was agreed to put the price back to 15 cents that Jennings had been quoting.

12609 Q. And I want to get, Mr. Cree, not any conclusion or characterization of what took place but as near as you can tell what was the conversation that you heard.

A. Well, in general, Mr. Wooden, the conversation was, as you mentioned down in Cleveland, that there was a difference of, Jennings' claim, of 8,000 barrels of cement, which was the reason that he had been selling cement at 15 cents a barrel under the previous price at Bay City, and that Mr. Johnson agreed to give that back to him, and the price of cement went back the 15 cents.

The Witness: What is the question again?

(Question read.)

A. Well, I don't recall the exact words, only that the quotations were going out on the 15 cent advance price.

Q. Was that on the Bay City basis?
A. That is on the Bay City base bringing it back to where it had been. The whole thing was a silly procedure.
Q. Did I understand you to say that the Bay City
12610 base was advanced 15 cents at that time or shortly after?
A. It was at that time.

12617

Chicago, Illinois,
December 15, 1938.

12620 J. B. CABANIS, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

12621 I am sales manager for the Northwestern States Portland Cement Company, Mason City, Iowa, and have held that position for about nine years. Prior to that time I was connected with a cement company in England for about three years.
Q. Does the Northwestern States have just the one mill at Mason City?
A. Yes, sir.
Q. What is its sales territory?
A. Well, it comprises Iowa, Minnesota, North Dakota, and about the western half of Wisconsin.
Q. You don't get into South Dakota?
A. No, we don't travel South Dakota.
Q. Is there a basing point at Mason City?
A. Yes, sir.
Q. Has there been a basing point at Mason City ever since you were connected with the company?
A. Yes, sir.
Q. Has the Northwestern States Portland Cement
12622 Company itself ever established basing point prices?
A. Yes, sir.
Q. At what time?
A. Well, I can't give you the date. I would say two or three times since I have been at Mason City. That is my guess.
Q. The other times from those two or three what has

been the method employed by the Northwestern States in pricing cement?

A. Apart—

Q. No, apart from those two or three times.

A. Oh. We met the competition that we found in the field.

Q. There was a basing point at Mason City even during those other times when you did not establish it, was there?

A. Yes, sir.

Q. And that was established by whom?

A. Lehigh.

Q. They also have a mill at Mason City?

A. They have a mill, yes, sir.

Q. Can you state the last time your mill established the base price at Mason City?

A. Well, I think it was in January of this year. It was in January. I don't know the date.

12623 Q. Was that a decrease or an increase?

A. An increase.

Q. Did your mill ever establish a basing point at the location of another mill?

A. Not during my time with this company.

12626 Q. Have you had a sales manager there at Northwestern States with the initials, "A. N."?

A. No, sir.

Q. Do you know who "A. N." is?

A. We have a chief clerk. My chief clerk is Nelson, Alf Nelson.

Q. Would you say that this Exhibit 2193 was Mr. Nelson's composition?

(Handing document to witness.)

A. Yes, sir.

Q. Is that his function, to send out notices to your trade or your salesmen concerning the changes?

A. That goes to the salesmen.

Q. I see. That is what this was?

A. Yes, sir.

12627 Q. And Mr. Nelson does it—

A. He does it at my instructions.

Q. He does it at your instructions. Have you had a Mr. Pray at your company?

A. Yes, sir.

Q. Who is he?

A. My assistant.

Q. You mean he is assistant sales manager?

A. Yes, sir.

Q. I am showing you a paper which is Exhibit 2197-A to F, inclusive. Do you remember talking to Mr. Royal representing the Federal Trade Commission about that paper?

(Handing document to witness.)

A. No, sir. If I did, he promised to return these files. He took some of our office copies; he was going to take them from my office and make copies and return them to me. He never returned me a copy of that.

Q. Do you remember the paper itself?

A. Well, I have seen it in this form before. I don't know as it was this paper.

Q. Do you remember seeing it in your files?

A. Well, in that form,—I wouldn't state we got a form that was set out like that.

Q. Is that an original paper from your files or a copy?

A. I don't know.

12628 Q. Can you say where you first saw or when you first saw a paper such as that?

Mr. Leisure: He hasn't said he saw it yet.

Mr. Wooden: I asked him.

Mr. Leisure: He said if this was taken, it wasn't returned. He hasn't identified it.

By Trial Examiner Norwood:

Q. Have you ever seen it before?

A. I don't know that I ever saw this one. I have seen a similar one. He said he was going to return everything that he took from my files, and this wasn't returned.

By Mr. Wooden:

Q. Did you ever see the same thing in the form that is embodied in Exhibit 1905-A to F, inclusive?

A. Just taking a glance at it, it looks like the same thing to me.

Mr. Leisure: Is that exhibit in evidence, that you are referring to?

Mr. Wooden: Yes.

Mr. Leisure: What is the number?

Mr. Wooden: 1905-A to F.

By Mr. Wooden:

Q. Did you attend a meeting at Chicago at which the

subject matter that is embodied in this Exhibit 2197-A to F—

A. No, sir.

12629 Q. —was discussed?

A. No, sir.

Q. Mr. Royal testified that he obtained that paper from you from your files and discussed it with you. I understand you have no recollection of any discussion?

A. No, I haven't.

Q. Where did the—

A. (continuing) He took a lot of papers from our files, I realize that. I don't remember how many he took. He was there,—he must have been there five or six times and we gave him everything he wanted.

Q. Where did the paper come from to you—

A. Well, I haven't the—

Q. (continuing) — which is represented by Exhibit 2197-A to F?

12630 By Trial Examiner Norwood:

Q. Did that paper ever come to you?

A. Yes, it was in our office, a similar one; not this paper, something of this form.

Q. Do you remember where you got it?

A. No, sir, I don't.

By Mr. Wooden:

Q. Did that represent the policy of your company in the classification of its trade between—

A. May I take a look at it?

Q. Yes, surely.

(Handing document to witness.)

Q. (continuing)—in the classification of your trade between dealer business and business to be sold direct?

12631 A. Well, I will tell you, I would say from the quick glance I have taken it is substantially the same method that we have been merchandising our cement ever since I have been in the business. There is some of these things that we don't do.

Q. Of course, the sales for Federal Emergency Relief agencies did not exist ever since you were in business.

A. It says there "except Federal," but purchases by Government agencies, we have always done that, and all the rest of it.

Now, you take down here—do you want me to go into this?

Q. I don't care to go into it in detail.

A. Well, there is a lot of things in here we don't follow now, never have followed.

Q. Do you mean to say that you don't know where the paper came from that you—

A. That is absolutely correct. It came—it came right at the time that—well, I don't know. I think it is along during the Code days.

Q. What do you mean by "Code days"? Can you fix the date of the Code days?

A. No, I can't fix that definitely.

Q. Did you see this paper before this morning?

Mr. Leisure: He has answered several times I
12632 think that same question.

Trial Examiner Norwood: I am not sure what he said. He can answer it again.

A. I have seen it before.

Q. When did you see it last before you saw it this morning?

Mr. Leisure: The witness has already said several times, your Honor, that he did not identify this specific paper, that they had one similar.

Mr. Paulson: The witness just said he saw this paper. The witness just got through saying he saw this paper before.

Trial Examiner Norwood: Yes. Let him go ahead, and find out what he knows about it, and when he did see it.

A. We probably have a copy of that, not maybe in that exact form, in our office.

12633 Q. Well, will you answer my question, as I put it, please?

A. I have seen it before.

Q. When did you last see it before this morning?

A. This morning.

Q. Before I showed it to you?

A. Something similar to that, yes, sir, in my own file.

Q. Did you talk to anybody about it?

A. No, sir.

Q. Did anybody talk to you about it?

A. No, sir.

Q. Did you bring the file here?

A. No, sir.

Q. That contains the paper that you refer to?

A. No, sir.

Q. How did you see it this morning?

A. It is the—I have it at the hotel.

Q. Did some one show it to you or go over it with you?

A. Oh, no. I have had it in my portfolio for years.

Q. Why did you carry it in your portfolio for years?

A. Just among other things I have stuck in there and never taken out.

Q. Did anybody discuss with you before your appearance here the matter of your testimony about this paper?

A. No, sir.

Q. Did any one ask you to bring with you here
12634 that paper that you say you have in your portfolio?

A. No, sir.

Q. How many years have you had it in your portfolio?

A. Well, I imagine since '35.

Q. You mean you had one in your files in addition to the one in the portfolio?

A. I don't know whether we had any in our files or not. That is probably—he said that was gotten from our office. That is probably the one he took from our files.

Q. Is the one you have in your portfolio a typewritten or a mimeographed copy?

A. It is typewritten.

Q. Just like 2197?

A. Well, it is in that form.

Q. Did you ever attend any meeting of cement manufacturers and dealers at which the subjects mentioned in Commission's Exhibit 2197 were discussed?

A. Yes, I did.

Q. Will you state when and where?

A. Well, I can't fix the date. I—it was about the time that our sales policy was published. When was that? '35?

Q. Did you put out some announcements of your sales policy?

A. Yes, sir.

Q. Conforming to what is stated in Exhibit 2197-A to—

12635 A. Well, I don't know exactly what you mean.

12636 Q. Well, I understood you to say you put out some announcements.

A. We have a sales policy.

Q. Announcements to your trade.

A. Yes, that is right.

Q. You put them out, I understood also, along about 1935?

A. That is my recollection.

Q. Is Exhibit 1907 an announcement that you put out on April 18, 1935?

A. Yes, sir.

12646 Q. Referring to 1907, do I understand that you have continued to abide by the policies stated therein?

A. Substantially. It isn't any different from what we have been operating on for twenty years.

Q. Did you ever sell direct to Federal emergency relief agencies?

A. I don't think so. You mean CCC and WPA, and so forth?

Q. Well, your policy in 1907 refers to Federal emergency or unemployment relief agencies.

A. That is what I interpret it, CCC and WPA. We never have direct.

Q. Did you ever sell direct to State governments for cement on emergency or Government relief agencies of the State?

A. No, sir, never have been asked.

Q. Is it your contention, Mr. Cabanis, that there

12647 are differences between the policy outlined in 1907 and in 2197?

12650 Q. Mr. Cabanis, showing you Exhibits 2191, 2192-A and B, 2193 and 2194, and calling your attention to the fact that these exhibits are all marked at the top as copies, some of them on the form, the letterhead or form of your company, do you still wish to say that the originals of which those are copies were never returned to you?

(Handing documents to witness.)

Mr. Leisure: Now, Mr. Cabanis, made no such statement with regard to those letters. I think counsel knows that.

Trial Examiner Norwood: Do you object to the question?

Mr. Leisure: That is my objection.

A. What I intended to say was that we made copies for him on one trip. I think on some of his trips he took the originals, and I don't remember of ever getting them back. I don't remember of getting that thing back.

By Mr. Wooden:

Q. As to these particular ones—

A. Yes, I remember that.

Q. —they are copies you provided?

A. Well, I will have to look at these first.

Q. Surely.

(The documents referred to were examined by the witness.)

A. What did you ask me about these?

12651 Q. Whether you wished to modify your testimony in any respect regarding the non-return of originals obtained by Mr. Royal, in view of the fact that these appear to be copies.

Mr. Leisure: Now, I object to the question, I think counsel knows perfectly well that the witness referred to a typewritten document—what is the exhibit number?

Mr. Withrow: 2197.

Mr. Leisure: (Continuing) —2197, and said that was not returned to him, was kept and was not returned, either it or the copy, and now counsel asks him to change his testimony about letters which he is showing him for the first time.

Mr. Wooden: He made a broader statement than that, Mr. Leisure.

Trial Examiner Norwood: Well, suppose you bring out facts now without any reference to what he has testified to heretofore. I will sustain the objection to that question.

By Mr. Wooden:

Q. I am showing you papers which are Exhibits 2198, 2199 and 2200, which Mr. Royal identified as coming from your files, and they are photographic copies, as you will see. Do you wish to say that the originals of those

12652 were not returned to you?

(Handing documents to witness.)

A. No, sir.

12654 Q. Referring to Exhibit 2200, was that a copy of your communication to one of your organizations?

(Handing document to witness.)

A. Yes, that is my letter.

Q. Referring to 2198, do you know whose handwriting that is on the margin?

(Handing document to witness.)

A. That is my handwriting.

Q. Mr. Lynch, does his name appear there in your handwriting?

A. Yes, both of them are the same fellow.

Q. And this 2200 is addressed to Mr. Lynch?

A. Yes, sir.

Q. He was one of your salesmen?

A. Well, we call him a contract man.

Q. What does that mean?

A. He just tries to sell contracts.

Q. You mean sell cement under contract for specific jobs?

A. No, I mean he contacts these contractors on the bigger operations that the territory men don't have time to follow.

Q. I believe you said, Mr. Cabanis, that you had attended meetings at which dealers and cement manufacturers were present, and at which discussion was had regarding the classes of trade that should be handled
12655 direct and the classes of trade that should be handled through the dealers, is that right?

12656 Mr. Wooden: We were diverted at that point, and I wanted to take it up again.

Trial Examiner Norwood: Yes. The objection is overruled.

The Witness: Did I answer that?

Trial Examiner Norwood: Not yet.

A. I attended this meeting you refer to where this sales policy came up.

By Mr. Wooden:

Q. Where was this meeting held?

A. At the Palmer House.

Q. In Chicago?

A. Yes, sir.

Q. And who were present?

A. Well, I don't remember who was present. There was quite a bunch of dealers there from all over the country.

Q. Were the dealers representatives of dealer associations?

A. Now, I don't know; not necessarily. I think there was a secretary there from one association.

Q. Who was that?

A. Well, now, remember, I am not definite about this.

Q. I understand. Do the best you can.

A. Mr. Lance, I think, of the Northwestern Lumbermen's Association was there.

12657 Q. Was Mr. Runion there from Nebraska?

A. I didn't see him. I don't know him very well.

Q. Do you know Mr. Hansen?

A. Yes.

Q. Was he there?

A. I don't think he was at this meeting.

Q. What other manufacturers were there?

A. Well, I remember that Mr. Rader and Mr. Rohrer were there and I think Mr. Fellows.

Q. Mr. Rohrer and Fellows are Universal-Atlas men?

A. No, Fellows is with the Alpha.

Q. I see. And Rader was with—

A. With Lehigh.

Q. —with Lehigh. What other manufacturers were represented?

A. Well, that is all that I can remember that were there.

By Trial Examiner Norwood:

Q. Were there others there that you can't remember?

A. No. I know all these cement men, and I don't think there were others there at the time I was there.

By Mr. Wooden:

Q. Did you receive this paper, which is Exhibit 2197, shortly following that meeting?

(Handing document to witness.)

A. No, I don't think so.

12658 Q. You can't say when you received it?

A. I don't remember when that meeting was.

Q. Would it help you any if I suggested March, 1935?

A. No, sir, it wouldn't.

Q. There was only one such meeting that you attended?

A. That is all I attended.

Q. When you received 2197-A to F, did you understand it to be a reflection of what had taken place at the meeting you attended?

A. No, not necessarily. I just took it that it was put into a statement, put into concrete form, a simplified form, of an interpretation of the practice we had been following.

Q. Of the things that were discussed at the meeting?

A. Oh, I didn't hear anything discussed at the meeting.

Q. You didn't hear anything discussed?

A. I mean anything of importance. They commenced to talk about sales of different classes, and we had already been following that. We had been doing the thing they were trying to sell up there to dealers in other parts of the country.

Q. Who called the meeting?

A. I haven't any idea.

Q. Why did you attend it?

A. Well, I was going to tell you. I was in Min-
12659 neapolis and I called on the J. F. Anderson Lumber Company, and either Mr. Weaver or Mr. John Dobson, I don't know who it was, told me there was going to be a meeting which he thought I would be interested in sitting in on, and that was two or three days after I saw him.

Q. Did he tell you what the subjects of discussion were to be?

A. Well, he probably did. I don't remember.

Q. Were they subjects like that?

A. Nothing definite; he never mentioned anything definite.

Q. Well, do you mean to say you went to the meeting without knowing what subjects were coming up?

A. Yes, sir. I just had a hazy idea as to what it was. I didn't have any definite thing.

Q. You had the idea it was to be along this line?

A. I knew the dealers had some grievances against the manufacturers and they wanted to thresh it out.

Q. As to the class of trade to be sold?

A. No.

Q. Is that the only invitation you got,—from the dealers?

A. Yes, sir.

Q. Does your last testimony help you in fixing the date of the meeting you refer to?

A. I beg your pardon?

12660 Q. Does your last statement or statements help you in fixing the date of the meeting you attended?

A. No, I really haven't the remotest idea of the date of that meeting.

12661 Q. Exhibit 2195-A and B, do you recognize that as a copy of bids submitted by your company? (Handing document to witness.)

A. No, sir.

Q. To the State of Illinois?

A. No, sir.

Q. The towns and counties and county seats don't help you on that?

A. No, sir.

Q. You ~~don't recall providing~~ Mr. Royal with that paper?

A. Yes, sir.

Q. I see.

A. It is a work sheet. It is not a bid.

Q. Oh, did I characterize it as a bid?

A. Yes, sir.

Q. Well, I didn't intend to.

Mr. Wooden: What did I say? Well, it doesn't matter.

By Mr. Wooden:

Q. Was this the work sheet on which you made up your bid?

A. Yes. I think I remember giving him one for Illinois and one of some other state.

Q. Was it for the Illinois bid in March of 1936?

12662 A. Is there any date on it? Well, it is on a bidding for Illinois, I can tell by the counties here, but I don't know the date of it.

Q. Would the prices help you any—

A. No.

Q. —as to date?

A. No, I should say not.

Q. All right. Well, now, Mr. Cabanis, will you produce that other copy that you have in your portfolio?

A. Yes, sir.

12664 L. J. CAPEN, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am vice-president and sales manager of the Davenport plant of the Dewey Portland Cement Company and have been there in that capacity since about the early part of 1927. There is another plant of the Dewey Company located at Dewey, Oklahoma. I am in charge of the sales of the Davenport plant.

12664 Q. What is the sales territory of that plant?

A. All of Iowa—all of central half of Iowa—I am 12665 confused. I mean, the eastern half of Iowa and southern part of Minnesota, almost all of Wisconsin except the extreme northern part, and almost all of the State of Illinois except the extreme southern part.

Q. Do you get into Milwaukee?

A. Yes, sir.

Q. Is the Davenport mill in Davenport or is it nearby?

A. It is in Lynnwood, Iowa, which is within switching limits of Davenport.

Q. It carries the same freight rate from the mill as from Davenport?

A. I can't answer that absolutely.

Q. Is Davenport a large consuming market for your product?

A. It is a medium-sized consuming market.

Q. Is there a freight rate from the mill into Davenport?

A. Yes, sir.

Q. A switching charge?

A. Yes, sir.

Q. How much?

A. I don't know absolutely, but I believe it is about 2.25 a hundred, two and a quarter cents a hundred-weight.

Q. Do other mills sell for delivery into Davenport?

A. Yes, sir.

Q. Is the Davenport mill of the Dewey Company a basing point mill?

12666 A. No, sir.

Q. Has it ever been?

A. No, sir.

Q. Can you tell us whether the Oklahoma mill of the Dewey Company is a basing point mill?

A. I can't answer. I don't believe that it is.

Q. Does the Davenport mill of the Dewey Company quote delivered prices on its product?

A. Yes, sir.

Q. Does it calculate those prices by ascertainment of the applicable base price?

A. We ascertain those prices by picking up quotations in the field and working back from the quotations to determine the price base.

Q. To get the price base. And then do you apply that price base to other destinations where it would make the lowest?

A. We apply the lowest combination of freight and price base, whichever makes the lowest price.

12667 (Question read as follows:) "Do you calculate
12668 what the base price is by picking up quotations at a number of points?"

A. Yes.

By Mr. Wooden:

Q. You don't pick up the quotations at each and every point before you determine what the base price is, do you?

A. It would be impossible to do that.

Q. Yes. How many points are sufficient to enable you to determine what the base price is?

A. I couldn't answer that.

Q. Don't you have charge of the practice in your company in that respect?

A. Yes, sir. There is no such figure. We don't say we pick up one or ten or twenty. We pick up enough until we are convinced in our own minds that there had been a change in the delivered destination price at which we are going to quote.

Q. Would five or six cases be sufficient?

A. I think so.

Q. And then, as I understand it, you figure back to get the base price and then apply that base price to other destinations that are in the same region.

A. Yes.

12669 Q. What are the basing points which are applicable in the territory where the Dewey mill at Davenport does business?

A. LaSalle, Hannibal, Missouri, Buffington, Indiana, Mason City, Duluth, Milwaukee, and I believe Green Bay, Wisconsin.

Q. Which of those points controls in the territory where the Dewey mill at Davenport does most of its business?

A. LaSalle, Mason City, Hannibal, Missouri, Buffington, Indiana, and Milwaukee.

Q. You are naming nearly all of them.

A. Oh, I think that is right.

Q. Which ones control the territory in which most of your business is done?

A. Well, it isn't fresh in my mind just where most of our business comes from. It varies from one year to another. I would have to check records to answer that correctly.

Q. What basing point controls the Davenport delivered price?

A. LaSalle.

Q. Do you then charge your Davenport customers with the LaSalle base plus the freight from LaSalle to Davenport?

A. Yes, sir.

Q. Do you use the freight rate books of the Cement Institute?

A. Not at Davenport.

12670 Q. Why do you say not at Davenport? Where do you?

A. Oh, I don't know whether they use them at Kansas City or not.

Q. I see. Have you ever used them at Davenport?

A. No, sir.

Q. What do you use?

A. We use freight books that are supplied us by our Traffic Department at our Kansas City office.

Q. The freight rates that you are interested in in calculating your delivered prices, then, are the freight rates from the respective basing points to destination; is that correct?

A. Yes, sir.

Q. And not the freight from Davenport?

A. We are interested in the freight from Davenport.

Q. I mean in the calculation of your delivered price.

A. No, sir.

Q. Let's get this straight, and see if we understand each other.

You mean that in calculating a delivered price, the freight from Davenport doesn't enter into it?

A. No, sir.

Q. But, of course, it is important to you?

A. Yes, sir.

Q. Yes. Does your freight department at Daven-
12671 port use the Institute freight books in any way?

A. No, sir.

Q. Or does the shipping department use them in any way that you know of?

A. You mean from Davenport?

Q. Yes.

A. No, sir.

Q. All the freight rates that you use in calculating delivered prices, as I understand it, are furnished you by your Kansas City offices?

A. Yes, sir.

Q. Is that right?

A. Yes.

Q. Do you know where they get them?

A. We have our own traffic department in Kansas City. I don't know definitely from what source they get them.

Q. Referring to Exhibits 2163-A to D, and 2164-A to D, can you state what those are?

A. I think they are work sheets covering our bids to the State of Illinois letting.

Q. It has been customary to prepare those in advance of submitting your bids on State highway business?

A. Yes, sir.

Q. Has it been customary to work out similar compilations on any other type or class of business?

12672 A. I don't understand your question.

Q. Well, these apply to State highway business. I asked if you worked out similar compilations for any other class or type of business than State highway business.

A. There are many points in the State letting, and the reason we use a work sheet is to figure all of the prices at those points, and then we like to check them, naturally, and we use a work sheet.

Q. I don't believe you grasp my question.

In selling commercial business, for instance, do you make work sheets that show the same things that are shown on

your compilations which you have in your hand there, 2162, and so forth?

A. I would say no.

Q. Is your commercial quotation to dealers at destination the same as your quotations to State highway purchasing departments?

A. It would all depend on the time of the letting and the time that we are quoting dealers.

Q. Speaking generally.

A. Generally, yes.

Q. At this particular time represented by these two exhibits, in January and February, 1932, what would you say?

A. I couldn't answer it unless I compared the records and price sheets of that particular time.

12673 Q. Don't you have any recollection as to whether you made any specially low prices to State highway commissions about that time?

A. It is very hazy in my mind, but I remember that we did.

Q. I mean lower than your ordinary commercial prices at that particular date.

A. Yes, sir.

Q. At destination. Do you mean that you were calculating your delivered prices for commercial business at that time by the use of basing points?

A. At that time we weren't calculating our commercial delivered prices. That letting was made up in the evening just prior to the morning of the letting.

Q. Well, can you say whether or not as of this time, in January and February, 1932, you were using the basing point method of calculating delivered prices for your commercial business?

A. I couldn't answer what is back of our making up our bids at that time.

Q. Well, that wasn't the question, what is back of making up the bids.

A. Well, I can't answer what method we used.

Q. Can you recall whether or not about that time or during that period of '32 you went off the basing

12674 point system for commercial business as well as State highway business?

A. We bid what we thought would be meeting competition at that letting.

Q. Well, can you answer my question any more specifically?

A. I would have to check my records to know whether we figured other bases on what did happen.

Q. Do you have any recollection at all as to whether your company continued to quote basing point delivered prices on commercial business in 1932?

A. Can I answer that question in my own way?

Q. Sure. Yes.

A. These bids were taken at this letting, as I remember, and we were in the period of a declining cement market, and we didn't know whether our competitors would bid a lesser price at the letting than had been our commercial price prior to the letting, and we wanted some business, and decided to bid a price that we thought would be competitive.

Q. And as indicated by 2163 and 2164, you didn't use any base price or basing point price at all in that bidding; is that right?

A. I couldn't answer that question yes or no because I don't remember at the time.

Q. Well, directing your attention to the papers,—

A. Yes, that is right.

Q. That says, "No base used."

12675 A. Yes, that refreshes my memory. "No base used."

Q. Now, having it in mind that you didn't use any base in the bidding on the Illinois business, in January and February, 1932, can you say whether or not you were using a base on your commercial business at that time?

A. Prior to that letting, yes, sir.

Q. How about after that letting?

A. I don't remember.

Q. Isn't that—

A. Let me modify the answer. I didn't understand it.

Trial Examiner Norwood: Yes.

A. I said yes, we did use the price base after that letting, that method of determining prices, but not the same one.

By Mr. Wooden:

Q. I mean, immediately after that letting, did you reduce your commercial delivered prices on commercial business and figure them in the same way that you did in the state lettings, Exhibits 2163 and 2164?

A. I don't remember that we did.

Q. I am not quite clear just what that answer means.

A. Well, my memory is very hazy as to what went on at that particular time, and I can't answer questions accurately unless I refer to records. I am practically guessing when I make a statement of that kind.

Q. Wouldn't it be an outstanding thing in your
12676 memory if you did go off the basing point system for commercial business at that time?

A. Yes.

Q. Well, did you or didn't you?

A. Well, what I meant to answer was that I didn't know whether our commercial destination prices were reduced after that letting or not.

Q. Well, I wasn't asking whether the prices were reduced. I am asking you whether you went off the basing price system in your method of calculating prices for commercial business.

A. I don't believe that we did.

Q. All right. In other words, you went off of it for State highway commission business but stayed on it for commercial business; that is right, isn't it?

A. Yes.

Q. Referring to Exhibit 2170, which has been identified as a copy of your letter to Mr. Tyler, under date of June 17, 1932, if some one put into effect a higher base price effective in your territory, do you consider that makes the market in that territory?

A. If others follow it, we do.

Q. Have you made it a policy to follow increases that others initiated?

A. As a rule, yes, sir.

12677 Q. If you found that a basing point mill sent out increased quotations or increased delivered prices that involved an increase in the base price, would you follow that without waiting any longer?

Mr. Leisure: Now, I think we are getting into the field of conjecture as to what he would have done if certain circumstances had been present.

Trial Examiner Norwood: Well, I take it that his question was to bring out his usual practice.

Mr. Leisure: It should be directed to what he has done.

Trial Examiner Norwood: Objection overruled. I shall ask him to answer that.

Mr. Wooden: That is intended that way.

Trial Examiner Norwood: Whether it was based on your usual experience.

12678 A. We would wait until we found out whether others were going to meet that same price, with the object of not being out of line.

By Mr. Wooden:

Q. In other words, you don't want to have delivered prices in effect at any point that are less than those of other concerns?

A. Don't want to have them in effect that are higher.

Q. Well, you don't want them in effect that are lower, either, is that right?

A. Yes, that is right.

Q. In other words, you want your delivered prices to be the same as those of your competitors?

A. We want to meet competition.

Q. And you mean, by meeting competition, having the prices at given destinations the same as your competitors?

A. Yes, sir.

Q. Referring to Exhibit, for identification, 1905-A to F, have you ever seen a document like that?

(Handing document to witness)

A. I think I have.

Q. Can you say where and when?

A. No, sir.

12679 Q. Did you have one in the files of your company?

A. I don't remember.

Q. Did you send out announcements to the trade in conformity with the principles stated in that Exhibit 1905?

12680 A. We sent out announcements to the trade outlining generally the policy. I can't tell that it embodied all these (indicating). It didn't look like that and it wasn't in this form.

12681 Q. Did you have before you at the time you sent out any announcements of your sales policy a document such as that in your hands, 1905-A to F?

A. Let me explain. I was out of the country for a period of time in 1935, and when I returned my assistant talked to me about having sent out an announcement to the trade relative to our policy. I haven't seen that for quite a few years. I remember it didn't look like that, and it was our own stationery and it was a letter.

Q. But you said you had a hazy recollection of having seen the paper or a copy of the paper—

A. Yes.

Q. —that you have in your hands—

A. That is right.

Q. —1905-A to F?

A. That is right.

Q. And I want to know where you saw it.

A. I couldn't tell you.

Q. What did your assistant have to say to you when you came back regarding that matter?

A. I don't recall that he discussed this at all.

12682 By Trial Examiner Norwood:

Q. Did he discuss the one he had sent out?

A. I have a hazy recollection he did. I couldn't remember what he said.

By Mr. Wooden:

Q. Well, give us the best recollection you have of the conversation between you and your assistant about the announcement of your sales policy.

12683 By Trial Examiner Norwood:

Q. Give us your best recollection about it.

A. I just can't do it.

Trial Examiner Norwood: H can't answer it. Go ahead.

By Mr Wooden:

Q. In other words, you have no recollection whatever?

A. Too vague to even try and make an answer.

Q. You do have some vague recollection?

A. Very hazy.

12685 Q. Referring to Exhibit 2172, a photograph of a copy of a letter from Mr. Tyler to you, is that Mr. Tyler's handwriting at the end of the letter?

(Handing document to witness)

A. I can't identify it absolutely, but it looks like it.

Q. It is your best opinion that it is?

A. Yes, sir.

Q. Did you receive from Mr. Tyler the list of prices that is referred to in that document?

A. I don't remember it, but if Mr. Tyler says that he sent it to me, I did.

Q. Did you check the prices that are referred to there?

A. I don't remember.

Q. As he asked you to do?

A. I don't remember.

12689 Q. Have you sometimes made bids to Illinois at certain points of delivery that you expected would be higher than the quotations of others at those same points?

A. I don't remember.

Q. Well, in the conduct of your Davenport mill business, can't you say whether or not you have sometimes figured high at certain points?

A. No, sir.

Q. Can you say, Mr. Capen, coming back to Exhibit 1905-A to F, whether you saw the similar document to that before or after you went on this trip that you referred to, and coming back and finding out your assistant had meanwhile sent out an announcement of sales policy?

A. I don't remember when I saw this, a document similar to this, but I believe it was after I made the trip.

Q. After you came back?

A. I think that.

Q. And can you fix the time that you came back?

A. Approximately the middle of March.

Q. It was in 1935?

A. 1935.

Q. Can you say when you left on that trip?

A. Approximately the middle of February.

12690 Q. The same year?

A. The same year.

Q. Referring again to this 1905-A to F, can you say if you saw it in your files, and if so, in what files of your company?

Mr. Leisure: The witness has already said he didn't know where he saw it. We have been all over it and now he is asking if he saw it in his files.

Trial Examiner Norwood: The objection is sustained.

Mr. Wooden: It is a more specific question, your honor, in trying to get a little more definite information. I don't understand just why it isn't permitted.

By Trial Examiner Norwood:

Q. Can you tell us where you saw that?

A. I can't remember.

Mr. Wooden: Even though he says that, I think I am entitled to ask him if he saw it in his files.

Mr. Paulson: He certainly should be permitted to try to refresh the witness' recollection.

Trial Examiner Norwood: If you can give him anything to refresh his recollection, go ahead, but there is no use in repeating the question when the witness says he doesn't know.

12691 Mr. Paulson: It is human nature to be able to refresh one's recollection from certain dates and things.

By Trial Examiner Norwood:

Q. Well, can you refer to any dates and refresh your recollection as to that?

A. There is no way I think I can, no, sir.

Trial Examiner Norwood: Go ahead.

By Mr. Wooden:

Q. Referring to this exhibit, 2174, is that your letter to Mr. Tyler?

(Handing document to witness)

A. Yes, sir.

Q. Who is the Mr. Cleveland that you referred to therein?

A. He was Director of Public Works for the State of Illinois.

Q. When you referred in this letter, 2174, to your telling a representative of the Universal-Atlas that he had cut the price, what price had he cut?

A. I don't remember. It is all too hazy in my mind to answer a question like that.

Q. Wasn't it the delivered price arrived at by using the applicable basing point, plus freight?

A. I don't remember.

Q. You don't know?

12692 A. I don't remember.

Q. Well, that is your letter?

A. Yes.

Q. And your language?

A. That is right.

Mr. Leisure: What is the date of that, please?

Mr. Wooden: 1930, I think.

The Witness: March, 31.

Mr. Wooden: 1931.

Mr. Leisure: 1931, seven years.

A. I couldn't answer you as to the circumstances surrounding that letter. A hundred and one things were going on at that time.

By Mr. Wooden:

Q. You have had such things as cut prices in the last two or three years?

A. What do you mean by cut prices?

Q. That is what I am trying to find out, what you mean by cut prices.

Mr. Leisure. You used the term.

Mr. Wooden: I know. He used it in his letter.

Trial Examiner Norwood: Yes. Tell him what you mean by cut prices.

Mr. Wooden: I am asking him as to his experience with cut prices in the last two or three years.

12693 By Trial Examiner Norwood:

Q. Do you understand the term "cut prices"?

A. I know what I understand by that term.

Q. What do you understand?

A. I understand the price less than a delivered destination price that has been quoted by us or any of our competitors to the trade.

By Mr. Wooden:

Q. And calculated on a basing point price, plus freight?

A. Not necessarily, if it was a published price.

Q. Would it be a cut price if it didn't equal the basing point price, plus freight to destination,—I mean if it fell below that?

A. Well, I stick to my answer. To my mind a cut price is a price that is lower than a published destination price that has been quoted by us or our competitors generally.

By Mr. Wooden:

Q. And that destination price is arrived at, as you described previously this morning, by using the basing point price, plus freight?

A. Generally.

12694 By Trial Examiner Norwood:

Q. Now, was there any of that going on since the date he mentioned there?

A. I don't ever remember a time when cut prices haven't been going on.

Trial Examiner Norwood: Go ahead.

12695 Q. Do you get evidence of that? What evidence do you have of it?

A. I would have to use a specific instance. They are so varying, and so many different kinds of evidence. One

time would be a customer of ours, a good customer for long standing, and we would quote him a price, and he would tell us that another manufacturer had quoted him a less price.

Q. In other words, you have to depend on the buyer's statement in such respects?

A. Well, there might be other instances or other means of determining it. You might see a price that would be quoted by our competitors. You might hear a competitor quote somebody a less price.

Q. How long since have you seen or heard your competitor quote a cut price in the sense that you have described it?

A. I don't remember.

12696 Q. Mr. Capen, you said this morning that the delivered price at Davenport was the LaSalle base plus freight to Davenport.

A. Yes, sir.

Q. What is that freight per barrel?

A. I don't remember exactly, but it is around 6½ cents a hundred-weight, around 25 to 29 cents a barrel. I don't know the exact price.

Q. Do you ship to LaSalle?

A. I don't recall ever having shipped a car of cement to LaSalle.

Q. Do you ship east of LaSalle?

A. Yes, sir.

Q. In Illinois?

A. Yes, sir.

Q. How far do you go east of LaSalle?

A. Clear to the Indiana line.

Q. Do you get out of the LaSalle base territory into the Buffington base territory?

A. Yes, sir.

Q. How much freight is there on your shipments
12697 from Davenport past LaSalle to some point that you can name?

A. I couldn't name a point without checking the record.

Q. Does it run more than the 25 or 28 cents that you mentioned before?

A. Yes, sir. Yes, sir.

Q. What is the largest amount of so-called freight absorption that you accept?

A. I couldn't answer that unless I checked my records at Davenport.

Q. Well, I wouldn't expect you to be exact on it, but you can give us an approximation, can't you?

A. Well, we have an account at International Falls, a dealer account that we ship there. I don't know what the freight absorption is to International Falls.

Q. What is that based on?

A. Duluth.

Q. Is the freight at International Falls as high as 75 cents or a dollar?

A. I don't think so.

Q. How about Milwaukee? What is it at Milwaukee?

A. Oh, the freight,—our freight to Milwaukee is somewhere between 50 and 55 cents a barrel. I don't know the exact freight rate without checking it.

Q. Do you realize that much less on shipments to Milwaukee than you do on shipments at Davenport, 12698 or is it a larger amount?

A. I would have to figure out what the delivered price at Milwaukee was, and deduct the freight to make the same comparison to Davenport.

Q. Well, can you do that?

A. I can give you a rough idea but not accurate.

Q. The best you can.

A. I believe after we deduct the freight, sacks, and the discount, on our cement we ship into Davenport we have about $1.79 per barrel.

Q. That is, plus the LaSalle freight to Davenport, is it?

A. No. I was only figuring our freight to Davenport, after we deduct our freight to Davenport.

Q. Oh, I see.

A. And after we ship cement to Milwaukee, and deduct our freight in sacks, and discounts from our delivered price, I believe on today's market we get around $1.30 per barrel. That is all subject to check as to exactly what—

Q. You have some wider variations than that in your net at various points?

A. I don't recall any right now. I wouldn't recall without making checks.

Q. You think that would be up near the top or extreme range of the variation?

A. I couldn't say unless I did a lot of checking 12699 on some shipments to other points.

Q. How about International Falls? How did International Falls compare with that? Was it greater or less?

A. I would say greater. By "greater" I mean we would have more—we would have a greater net than the cement we shipped at International Falls.

Q. Did you state what your net was on the Davenport business?

A. I think I said it was approximately $1.79.

Q. Now, referring to Commission's Exhibit 2176, will you state to what extent your Davenport mill has made trades with other mills for delivery of cement?

A. To the best of my memory, I don't believe we made any trades.

Q. Exhibit 2178, is that your letter?

A. Yes, sir.

Q. Was it your experience and observation at that time that Marquette was cutting prices on the Illinois highway business?

A. This happened a long time ago, and my memory is very hazy. If I remember correctly, we had bid on Illinois lettings and the bids had been rejected. They were taking bids again.

Q. Look at the second paragraph of the letter.

A. That is right.

12700 What is it that you want?

Q. Whether it was your experience and observation that Marquette was cutting prices on bids to the Illinois Highway Commission.

A. If I remember correctly, I believe they cut on the bids that were taken at the letting that I referred to that the bids were rejected.

12701 Q. Did anything come of your suggestion of somebody getting Marquette in line to bid?

A. If I remember correctly, the prices were cut even worse than they were before.

Q. Do you know whether any attempt was made to get Marquette in line?

A. No, sir, I don't.

Q. Referring to Exhibit 2180, is this Mr. Tyler's letter to you?

(Handing document to witness.)

A. I don't remember the letter. I am not sure that was a letter by Mr. Tyler. I don't see his signature.

Q. Look at the second paragraph, will you, and then say again whether or not you know of any trades that were made between your company and others with re-
12702 gard to the deliveries of cement?

A. No, sir, I still don't remember any trades that were made.

Q. Referring to Exhibit 2183, do you recognize that as a letter to you from Mr. Tyler?

(Handing document to witness.)

A. This, I think I remember this letter, yes. I don't remember it in detail.

By Mr. Wooden:

Q. Did you understand the figure of 61 cents with regard to the Milwaukee sales as being the mill net on those sales?

(Handing document to witness.)

A. Yes, sir.

Q. Is it your understanding or knowledge that some companies get into Milwaukee by water for approximately 10 cents a barrel?

A. I can answer the first part of the question, that they do get in by water, but I don't know the amount they get in there for.

Q. I believe you gave the freight rate from Davenport or from your mill to Milwaukee a while ago.

A. Approximately, yes, sir.

12703 Q. Exhibit 2184, is that your letter to Mr. Tyler?

(Handing document to witness.)

A. Yes, I think that is my letter.

Q. It is your signature?

A. I don't know whether that is my signature or my secretary's signature.

Q. But you recognize the letter?

A. I think that it is my letter, yes, sir.

Q. What was the basis of your statement that Marquette was making deals of a dime off to practically all line-yard companies?

A. I can't remember now what was the basis, except I felt reasonably sure from the information gathered that that was true.

Q. When you referred to Marquette making deals of a dime off,—a dime off what?

A. Of the prices that we were selling in various towns.

Q. You mean, do you not, a dime off the destination price figured by applying the lowest sum of the base price, plus freight?

A. Yes, sir.

Q. Would you say then that Marquette was underselling the market price?

A. Yes, sir.

12704 Q. Referring to Exhibit 2185, is that Mr. Tyler's letter to you?

(Handing document to witness.)

A. I would say that it is, although I don't absolutely know whose it is.

Q. Is 2186 your reply to it?

(Handing document to witness.)

A. May I have that other?

(The document referred to was handed to the witness.)

A. No, sir, I wouldn't say so. This letter is the 22nd and that was the 13th.

Q. Yes, all right. 2186 is a letter of yours to Mr. Tyler, however, isn't it?

A. Yes, sir.

12705 Q. What do you know about the meeting in Chicago which Mr. Tyler referred to in his letter to you, which is Exhibit 2185, the last paragraph?

A. Is this—

Q. (Indicating.)

A. Oh, yes. I couldn't answer that now.

Trial Examiner Norwood: Talk out loud.

A. I couldn't answer that now. I haven't the slightest idea.

By Mr. Wooden:

Q. Well, look at Commission's Exhibit 2186 wherein you stated or referred to the report of that meeting and expressed regret that more was not accomplished. Does that enable you to tell us any more about that meeting?

A. Absolutely not.

Q. You did get a report of it.

A. Well, this letter indicates that I did, but I don't remember it.

Q. Did you get it from Mr. Tyler?

A. According to this letter, I did.

Q. Did you attend a meeting on August 20, 1931, that

is, the meeting that is referred to by Mr. Tyler in Commission's Exhibit 2185?

A. Not to my memory.

Q. Commission's Exhibit 2187, is that your sig-
12706 nature and handwriting at the bottom?

A. Yes, sir.

Q. What has been the policy of your Davenport mill with regard to loading for delivery by trucks?

A. We did ship cement by truck, our Davenport plant, and we discontinued it.

Q. When did you discontinue it?

A. I don't remember.

Q. Could you say about when?

A. No, sir; I couldn't. It is a matter of two or three years or four years. I don't remember.

Q. Was it as long ago as 1932?

A. I couldn't say that.

Q. How far was cement being trucked from your plant?

A. I don't remember.

Q. Don't you have any idea at all?

A. I would say dealers that come in as far as 20 or 25 miles away.

Q. You think that is about the maximum distance?

A. I wouldn't remember.

Q. The dealers sent their own trucks into the mill and had them loaded there?

A. Yes, sir.

Q. What price did you charge for cement loaded on trucks that way to dealers?

12707 A. Delivered destination point at the town in which the dealer's place of business was located.

Q. The destination price figured on the rail basis?

A. The rail basis, yes, sir.

Q. Did you find that some dealers took the cement in trucks into territory of other dealers and undersold them?

A. I believe that I remember there were instances, although I don't remember the particular instances.

Q. Did that tend to disrupt or upset the regular destination price at the point to which taken?

A. I don't remember if it did or not.

Q. Well, it isn't altogether a question of memory. Based on your experience in the business, did it have that tendency?

A. I think it would, yes.

Q. Referring to Exhibit 2188, and calling your attention to the circle shown on the map there surrounding Davenport, was that area within that circle the approximate area within which cement was being trucked from your mill at one time?

A. Well, as near as I can remember, cement was never trucked to some of these points around here (indicating). We trucked a lot closer than that.

Q. Was it trucked to Cedar Rapids?

A. I don't remember whether it was or not.

Q. Did you truck to Clinton?

12708 A. I don't remember that either.

Q. Did you truck to Iowa City?

A. I don't remember that.

Q. Muscatine?

A. Yes, Muscatine. There was some cement trucked to Muscatine.

Q. Dubuque?

A. I don't remember that.

Q. Wasn't one of the reasons you discontinued trucking because it had this disturbing effect on the destination prices that you mentioned?

A. I would say that was one of the reasons in the tri-cities.

Q. Tri-cities? You mean by that—

A. Rock Island, Moline, and Davenport.

Q. What were the reasons that led you to initiate the loading of cement by trucks at your plant?

A. Well, that was the policy that Mr. Tyler told me to adopt when the plant started shipping cement at Davenport. I had never been in the cement business before that date and I didn't question the whys, in 1927.

Q. Don't you know the reasons underlying the policy at that time?

A. I think he thought that it would give us a help in getting business in the tri-cities.

12709 Q. Does that mean that the dealers for whom trucks were loaded appreciated that service, or what?

A. Well, I don't know whether they appreciated it or not, but I think they felt that they could make money by trucking from our plant.

Q. Did you find some of them favored it, made use of it?

A. Yes, they all—most of them did make use of it, yes, sir.

12710 *Cross Examination by Mr. Leisure.*

Q. Mr. Capen, Mr. Wooden asked you in calculating the difference of the delivered prices whether or not it wasn't the fact that the freight from Davenport did not enter into it. I think you said that the freight from Davenport did not enter into it. Did you mean by that that you do not consider your freight in order to determine whether you can afford to take certain business?

A. No, sir, I didn't mean to infer that.

Q. Do you consider the freight or do you not consider the freight when you are considering whether or not you can meet a certain price in any given market,—I mean the freight from Davenport?

A. Yes, sir.

Q. So are you correct if you did state that you never considered the freight from Davenport or that the freight from Davenport did not enter into your calculations? Is that a correct statement if you made such a statement on direct examination?

A. I don't remember. What I meant to say was that in determining a destination delivered price, that we didn't consider the freight from Davenport in making that price.

Q. That is, if the destination price at a given place is based on some other place than Davenport, you did

12711 not figure the freight, is that what you mean?

A. Figuring destination prices did not necessarily mean we would want to ship cement to that destination, but in figuring that price we didn't use freight from Davenport in arriving at the destination price.

Q. And that applies to cases where it was based on some other place, where the price was based on some other place than Davenport, doesn't it?

A. I don't know of any prices that are based on Davenport.

Q. So that what I want to find out is as to whether freight enters into it on sales—

A. On sales, yes, sir.

Q. —of cement?

A. On sales, yes, sir.

Q. You do figure the freight from Davenport before you determine what price you are quoting, is that true? I mean, Mr. Capen, if you find a given market that you

want to compete in, whether you want to sell in that market, you must figure how much the freight is,—

A. Yes, sir.

Q. —isn't that true?

A. Yes, sir.

By Trial Examiner Norwood:

Q. You figure the freight from Davenport to find out whether or not it gives you enough mill net to justify
12712 your making the delivery, is that right?

A. Yes, sir.

Mr. Leisure: That is my point.

By Trial Examiner Norwood:

Q. But in figuring your price in territory controlled by another base point, you do not figure the Davenport freight in the price?

A. That is right.

Q. You figure the base—

A. Yes, sir.

Q. —the freight from the base to the point of delivery?

A. Yes, sir.

By Mr. Zimmerman:

Q. So far as you know, did your company ever initiate a price anywhere?

A. I don't remember of our company ever having initiated a price.

Q. It was always your custom to follow the lead of other mills with which you compete in your business, was it?

A. Yes, sir.

12713 Q. Do you recall any price changes in the spring of 1937 in the territory sold by your mill from Davenport?

A. Oh, I am not sure of the time, but there were some price increases, I believe, made along that time.

Q. I didn't ask you to fix the exact date by any means, but just say in the spring of 1937. Do you recall any circumstances of picking up quotations in the field of prices that were higher than they had been?

A. Yes, sir.

Q. Tell us what your recollection of that situation is.

A. I believe we picked up prices that reflected an increase in the price base at LaSalle.

Q. And did you follow that price?

A. Not immediately.

Q. And what happened within a short time after that, as to any other change in price that came about?

A. If you are referring to the same time that I am referring to, others finally did raise their prices and we also raised ours.

Q. Well, wasn't there a period in the spring of 1937, in May, 1937, particularly, when you picked up some price raises, some higher quotations of delivered prices in the Illinois territory, or I should say in the territory served by your mill and some of the Illinois mills, which were not followed—

12714 A. Yes, sir.

Q. —and which later were then reduced?

A. Yes, sir.

Q. Within about what period of time were these attempts at price raises discontinued or withdrawn?

A. I can't—

Q. I don't care to have it exact, but just an approximate period.

A. Ten days.

Q. Is that the sort of thing that occurs every once in a while in your industry or not? I mean to say, where somebody will come out with either a price raise or a price decrease and then others may not follow it and it is withdrawn?

A. I don't know how customary it is, but it has happened.

By Trial Examiner Norwood:

Q. Do they refuse to follow a price decrease?

A. I don't know of anybody that has refused to follow a price decrease.

12715 *Redirect Examination by Mr. Wooden.*

Q. Mr. Capen, when announcements of increases are made and you find them in the field, are they ordinarily announcements of increases to take effect some days in the future?

A. Well, in the immediate future, yes, sir.

Q. Specifying the date when they do become effective?

A. Yes, sir.

Q. And are you able to determine whether others than the first concern putting out the notice of an increase also put out their notices before that increase date?

A. If we pick up an increase notice from one of our competitors, we would immediately get in contact with our salesmen to find out if other points had had a similar increase and if other manufacturers had also made increases.

Q. And you are able to find that out before the increase actually—before the increase date arrives?

A. Not always.

Q. But ordinarily?

A. Some manufacturers have come out and had a different date at which they increased their price. When they did that, it immediately meant the low price was still in effect up to the last date given by the manufacturer.

12716 Q. Are you not aware of a custom or practice of giving five days notices of increases?

A. Yes, sir.

Q. And you can usually tell, can you not, before the five day period is up to what extent others are falling in line?

A. That hasn't always been true.

Q. I didn't say it was always true, but isn't it—

A. Generally.

Q. —generally true?

A. Generally.

By Trial Examiner Norwood:

Q. Is it sometimes more than five days?

A. Sometimes a manufacturer will come out with a quotation increasing his price and giving his customers five days in which to protect themselves and that results in an effective date.

Q. Yes.

A. (continuing) And some other manufacturer may wait three or four days before that time to issue a similar quotation.

Q. But sometimes haven't they given them longer than that to protect themselves, longer than five days?

A. He gives them fifteen days, if I remember correctly, in which to cover certain jobs that have been held.

12719 J. B. CABANIS resumed the stand and testified further as follows:

Direct Examination by Mr. Wooden.

Q. Mr. Cabanis do you have with you now the document which you said was in your portfolio at the hotel?

A. Yes, sir.

Q. May I see it, please?

(A paper writing was handed to Mr. Wooden by the witness.)

Q. Can you tell us now where this particular document came into your possession?

A. Well, I got it out of my portfolio. You mean originally?

Q. Yes. How did it first get into your possession?

A. Well, my recollection is that was on my desk when I came back from a trip. It was there with other files, and I threw it into my portfolio to study when I had the time.

Q. When was this trip? Was that in 1935?

A. Oh, I imagine it is. It is about the time that—that has got a date on it; hasn't it?

Q. Yes.

A. It must have been.

12720 Q. Do you know why the typing or the typography of the different pages is of a different style?

A. No, I don't because I don't know where it came from and how I got it.

Q. Is that just like it was when you found it on your desk, in 1935?

A. It must have been, because my recollection is I threw it in my portfolio, and I have referred to it once or twice.

Mr. Wooden: I think you had better give it a number, Mr. Reporter.

(The paper writings above referred to were thereupon marked for identification as Commission's Exhibits 2220-A to F, inclusive.)

By Mr. Wooden:

Q. Now, the paper that you have just produced as one from your portfolio has been marked, for identification, as Commission's Exhibit 2220-A to F, inclusive. That is right, isn't it?

A. Yes, sir.

Q. Can you explain why there is a date on the one you have just produced and no date on the one which is in evidence as 2197-A to F, inclusive?

A. No, I can't.

Q. Was that date "5/28/35" on Commission's Exhibit 2220 about the time or how close to the time was it
12721 that you returned from your trip to find it on your desk?

A. Oh, I haven't any way of fixing that date. That is my guess, that it must have been soon after because it wouldn't lay on my desk very long if it had the date of the 28th of that month.

Q. And when you saw it didn't you recognize that it covered the subject matter of the discussion of the meeting that you have testified to attending this morning?

A. No, I didn't listen in on that meeting, as a matter of fact.

Q. You mean you attended the meeting and didn't hear what was going on?

A. It was there for about two hours.

Q. And you don't know what was going on during that time?

A. Well, I know that they had,—some dealers had some different things to put up to the manufacturers but—

Q. Things like involved in this paper?

A. Well, for instance, emergency relief. We hadn't sold any emergency relief work except through dealers anyway, so I wasn't particularly interested in it.

Q. Yes. The question of how to handle the emergency relief purchases, was that the big subject of discussion?

A. I didn't hear any discussion on that at all.

Q. I thought you said just a moment ago that emergency relief purchases were discussed?

12722 Mr. Wooden: Read back there, Mr. Reporter.

A. I said it didn't interest us because that was one of the things they had up, as I recall it.

Mr. Wooden: Well, let's see what the record shows.

(Record read.)

Mr. Zimmerman: When the witness made the answer, he was referring to the paper. When the witness made the answer, it is quite apparent that he was referring to the paper in his hand and the discussion of emergency relief that was made in the paper.

Mr. Wooden: No, that is very clear to me from the answer.

Mr. Zimmerman: It is just as clear to me.

Trial Examiner Norwood: Yes. The counsel who is conducting the examination may clarify that if he wishes.

Mr. Zimmerman: Sure.

Trial Examiner Norwood: And if he doesn't wish to clarify it, you may clarify it on the cross-examination.

By Mr. Wooden:

Q. Do you wish to say, Mr. Cabanis,—state whether or not the subject of the emergency relief purchases was discussed at this meeting that you attended?

12723 A. I can't say definitely. I heard it from individual dealers before this meeting.

Q. Did you hear any manufacturers discuss it at that meeting?

A. No, sir.

Q. As a matter of fact, you say you don't know what was going on during the two hours?

A. I practically don't know what was going on.

Trial Examiner Norwood: Was it suggested to you that they wouldn't discuss such a subject?

The Witness: How is that?

Trial Examiner Norwood: Was it suggested to you prior to the meeting that they wouldn't discuss such a subject?

The Witness: Well, prior to the meeting, the information that I had was that there was a meeting between the dealers and the manufacturers. The dealers had some grievances to put up to the manufacturers, and perhaps I would be interested, so he suggested that I attend.

Trial Examiner Norwood: Yes. Well, did you try to find out what those grievances were?

The Witness: Well, I went to this meeting. I didn't attempt to—

Trial Examiner Norwood: Did you find out the

12724 main subject of the discussion?

The Witness: Well, I just had a hazy idea. I didn't—there wasn't any detail or discussion. There wasn't any orderly meeting, as I recall it. There was a bunch sitting in this corner, and a bunch sitting in that corner, and a bunch sitting in this corner, and a bunch sitting here, and I was sitting here by myself (indicating).

Trial Examiner Norwood: Go ahead.

By Mr. Wooden:

Q. When was this perpendicular fold in the papers put in there?

A. When I got it out of my file or portfolio.

Q. When you got it out of your file?

A. Yes, sir.

Q. You creased it yourself, did you?

A. This noon, yes, sir.

Q. Just this noon?

A. Yes, sir.

Q. It was all—there was no crease—

Mr. Leisure: Oh, we are wasting time on this.

Trial Examiner Norwood: Wait a minute; no.

Mr. Leisure: I hope there are some limitations—

Trial Examiner Norwood: Off the record. This is all off the record.

12725 By Mr. Wooden:

Q. Were the papers unfolded when you found them on your desk?

A. That is just exactly—oh, I don't know about that. Oh, no, that has been in my portfolio ever since I got it.

Q. Was the binding clip that runs through all the pages in the upper lefthand corner there when you found it on your desk?

A. I can't tell you. I imagine it was.

Q. You know nothing about putting it on there?

A. No, I didn't put it on there.

Q. What do these x's, pencil x's and pencil check marks on the paper mean?

A. That is what I told you before I came over here this morning. I went through that and commenced checking the thing out, started at about 1930 and got as far as those marks show, where there was a variation, that intepretation, and the sales policy.

Q. Had you been informed that this subject was up here for testimony?

A. Well, I saw where our sales policy had been introduced into evidence.

Q. Did you learn that after arriving here?

A. No, sir. It was last week sometime.

Trial Examiner Norwood: You got that from the 12726 record?

The Witness: From the transcripts, yes, sir.

12727 Q. Mr. Cabanis, you say you got the record on this subject concerning your company last week?

A. No, the sales policy. That is what I call an interpretation.

Q. Oh, yes. Why did you check your sales policy announcement with this Exhibit 2220-A to F before you appeared here this morning?

A. Well, I tried to remember what was in our sales policy and I tried to check—

Q. But why were you interested in 2220-A to F, in connection with your announced sales policy?

A. Well, there is some connection between that, as I explained to you this morning.

Q. What connection is there?

A. Our interpretation.

Q. You mean that—what connection is there between your announced sales policy to the trade and the method of marketing cement, which is Exhibit 2220-A to F?

A. Well, that sales policy announces how these different classes will be sold, without any explanation.

Q. And 2220-A to F, what about it? Does that give the explanation?

A. That interprets it substantially, with those exceptions. I told you. I told you the way we merchandise 12728 our cement, according to that sales policy.

Q. Why have you carried that 2220-A to F in your portfolio?

A. I can't tell you. I threw it in there, I told you, at one time and it has been in there ever since I got it.

Q. Without being used or referred to in any way?

A. I probably picked it out and analyzed it when I had time, but I have never used it.

Q. Didn't you consult it from time to time in determining what class of trade your concern would sell direct—

A. No, sir.

Q. —or what it would sell to dealers?

A. No, sir.

Q. Never referred to it in any such connection?

A. I never referred to it.

Q. In other words, your checking today is the first time you ever did that sort of checking?

A. That is the first—well, at the time I read it after

I got it, you might call it checking, the same as I did today.

Q. Have you known of this being in your portfolio all the time in the last three years?

A. I have seen it a number of times, but I just didn't take the trouble to throw it out.

Q. Can you say why you took the trouble to
12729 put it in, in the first place?

A. I told you I found it on my desk when I got back from my trip, and I had a lot of files I had to handle, and I was going to go away the next afternoon or the next day, and I threw it in to study when I had an opportunity.

Q. What called it to your mind this morning, to check it with your announced sales policy?

A. Well, I had read the transcript of the testimony here last week, when Mr. Runion was here, wasn't he?

Q. He was here last week.

A. And Mr. Hansen. One of them introduced it into evidence, I think.

Q. No, you are mistaken.

A. I am talking about the policy.

Q. Oh, yes, your company announcement?

A. Yes.

Q. The other paper, however, was not offered until yesterday, if I am not mistaken.

A. I don't know about that.

Q. Well, the record will show it. Do you recognize Exhibit 2220-A to F as being—

A. That is "A", isn't it?

Q. Yes, A to F.

A. Oh, I see. As what?

Q. —A to F as being a record of any meeting
12730 of dealers and manufacturers that you attended?

A. Absolutely not.

Q. Have you provided your sales force with any copies of this paper, this 2220-A to F?

A. I am certain that we haven't.

By Trial Examiner Norwood:

Q. You provided them, did you not, with a statement which you considered an interpretation of that? Was that your previous testimony?

A. No, it is our policy when anything outside of the ordinary routine comes up, for them to take it up with our office.

Q. The thing that you furnished them, that statement in evidence, didn't you say that you considered that that was an interpretation of this paper here, 2220-A to F?

A. Well, in a way, yes, but we weren't following it. Naturally, I don't think I sent it to any salesmen, because we had certain practices that doesn't conform with that, you see. For that reason, I don't think I ever sent them a copy.

Q. Whenever a question was referred to you as to handling of a particular class of business, did you
12731 ever refer to this paper, 2220-A to F?

A. No, sir.

Q. Has there been any substitution of pages in this 2220-A to F, within your knowledge, compared to what you had when you first saw it?

A. I testified that is the exact paper that I got at that time, and to my knowledge, it hasn't been tampered with or touched upon. I may have taken it out, as I said, to analyze it, but there hasn't been any substitution of anything.

Q. Do you know why this paper you just produced bears a date of 5-28-35, while the one Mr. Royal got from your file bears no date at all?

A. No, I don't.

Q. In making sales to counties for highway pavement contracts and bridge, culvert and repair work and awarded as part of highway pavement contracts, what period of delivery do you quote for?

A. Well, in the territory that we solicit, most of the highway departments award the bridges and culverts separately and not as a part of their slab, as a part of their pavement. They let the slab separately and they let the bridges and culverts separately.

Q. What period of delivery do you quote and sell for on purchases by contractors on work awarded by
12732 state agencies, except emergency relief agencies?

A. Well, we sell them a specific job, I think. Let me see that.

Q. Can't you testify from your own knowledge?

A. No, I think that would be a specific job.

Q. Well, I asked you what period of delivery you quoted for.

A. Read the question again, please, will you?

Q. Read the question.

(Question read.)

A. We sell them for the duration of the job. That is what we call a specific job.

Q. Do you sell them for a period required for the completion of the work, is that what you mean?

A. Yes, sir.

Q. Do you also quote as an alternative or for fifteen day delivery?

A. No, sir, not where it is a specific job, where it is a definite piece of construction work that they have been awarded the contract on.

Q. Let me ask you this, Mr. Cabanis: Have you had any help from anyone in preparing for your testimony here today?

A. No, sir.

Q. Have you talked to anybody about it?

A. No, sir.

12733 Q. Do you sell cement to contractors for highway pavements and grade crossing elimination projects?

A. Yes, sir.

Q. Do you sell that direct to contractors?

A. Well, we sell part of it direct.

Q. Which part do you sell direct and which do you not?

A. We sell highways direct when they are outside the corporate limits of cities, towns and villages. We sell an overhead or underpass, whatever they call it, when it is outside the corporate limits of a city, town or village.

If it is within the corporate limits, we sell that through the dealer.

Q. Suppose part of it is inside and part outside, what do you do then?

A. Well, I don't know, that depends on the circumstances. Sometimes we will sell it direct and sometimes we will sell it through the dealer. It depends on how strong the dealer is.

Q. How do you determine from your sales policy announcement, 1907, that distinction between whether the job is located within the corporate limits or without?

A. Why, we get a blueprint from the highway department. You see, that will show that.

Q. But as to how you should sell that, how do you determine that from your policy?

12734 A. Well, I would say as a general proposition we follow what you read there. Sometimes we make an exception.

Q. You mean what I read there from Exhibit 2220?

A. No, I said sometimes a paving job might be located, maybe all of it is in town except a half a block, which is outside of town, and according to our interpretation it would be sold direct, but we don't always follow that.

Q. You meant what I did read from as 2220-A—

A. You asked me about highway pavement and underpasses and overheads, and I told you how we sold them.

Q. Would you sell them in accordance with this statement in 2220-B?

12737 Mr. Zimmerman: I would like to add one more thing, if I may.

If he asks the witness whether or not he sold in the manner that is described in the paper—

Trial Examiner Norwood: Yes.

Mr. Zimmerman: That is more apt.

Trial Examiner Norwood: Yes.

Mr. Zimmerman: And it seems to me fairer to the witness and it is not likely to be misinterpreted.

Trial Examiner Norwood: Will you accept that amendment?

Mr. Wooden: Yes, I don't mind.

The Witness: Well, the answer is no.

12738 By Mr. Wooden:

Q. Mr. Cabanis, did you have more than one copy of this method of marketing cement which you produced, this Exhibit 2220-A to F, inclusive?

A. That is the only copy I have, and Mr. Royal identified a copy he got from me when he was down there, so that answers that question.

Q. Did you ever have more than one copy?

A. No, sir, I never had any copies made.

Q. Did anybody ever provide you with more than one copy?

A. No, sir, not that I know of.

Mr. Wooden: Now, Your Honor, I don't know just what to do with this Exhibit 2220-A to F, but I think I shall offer it subject to a later decision as to whether to withdraw it in view of the fact that several duplicates of this thing—

Trial Examiner Norwood: Are already in?

Mr. Wooden: Or near duplicates have turned up in various places.

Trial Examiner Norwood: I think there is a stipulation that that is identical with some of the exhibits that 12739 have already been received.

Mr. Leisure: If it is a duplicate, I don't know why it should go in the record.

Have you checked it, Mr. Wooden?

Mr. Wooden: I haven't checked it with Commission's Exhibit 547-4D.

Mr. Leisure: Why can't it be offered subject to check, and if they are the same, then it will only leave one. Why have two?

Trial Examiner Norwood: Well, the exhibit is proffered, and it can be turned over to counsel for Respondents, and they may check it, and we may make it the subject of a stipulation later.

Mr. Wooden: I should state that the Exhibit 547-4I, which is the last page of that particular circular, does bear the same date in the lower lefthand corner as the date on Commission's Exhibit 2220, 5/28/35.

Trial Examiner Norwood: Well, let counsel for Respondents compare it.

Go ahead.

Mr. Wooden: It may be, Your Honor, the fact that these turn up in so many different places—that may be a fact from which some inferences may be drawn.

Trial Examiner Norwood: That may be included 12740 in the stipulation.

E. E. HARTLEY, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

12741 I am sales manager of the South Dakota cement plant, Rapid City, South Dakota, and have occupied that position since March 1925, which was approximately the time when the plant began operations.

Q. What is the sales territory in which the output of the plant is sold?

A. South Dakota, western North Dakota, western Nebraska, northern Wyoming, one or two towns in Iowa,

one or two towns in Montana, and we do ship an occasional few cars into Minnesota at one or two points without sales effort.

Q. Do you have salesmen calling on the dealers?

A. Yes, sir.

Q. In all that territory that you have?

A. Approximately all of it, yes, sir.

12743 Q. Is the Rapid City plant, or Rapid City a basing point in the sale of cement?

A. Yes, sir.

Q. Has it always been?

A. As nearly as I can remember, since 1926; originally we were not.

Q. Pardon?

A. Originally we were not.

Q. How long after you started operations did you become a basing point?

A. About a year.

Q. About a year?

A. Yes, sir.

12744 Q. Did you make your plant at Rapid City a base mill in the first instance?

A. No, sir.

Q. Prior to the time that it became a basing point mill, how did you calculate your prices?

A. As nearly as I can remember, we based on the nearest mill that was a basing point.

Q. And what was that?

A. As near as I can remember, we based or made the price from the base of the nearest basing point mill.

Q. And what was that?

A. I think Mason City, Iowa.

By Trial Examiner Norwood:

Q. That wasn't the nearest mill then, was it?

A. No, the nearest basing point mill.

Q. Were there any mills nearer you than the basing point mill?

A. Well, I wouldn't know the exact mileage. There is a mill at Superior, Nebraska, and whether that is nearer in miles than Mason City, I wouldn't be prepared to say, without looking it up in the directory, and since that time one or two others have been built too, who are probably closer.

By Mr. Wooden:

Q. You say you did not make Rapid City a basing point when you started?

12745 A. No, sir.

Q. State whether or not some other mill put in a basing point price at Rapid City?

A. Yes, sir, they did.

Q. About a year after you started?

A. As nearly as I can remember.

Q. What mill was that?

A. As I remember it, it was the Lehigh at Mason City. Now, I will qualify that answer too. That is my memory, and it is possible that the Lehigh would be the first price circular that our salesmen picked up and there might have been price circulars out putting us on a mill base and we not know it.

Q. Prior to Rapid City becoming a base point, did you figure your delivered prices by adding freight from the basing point at Mason City?

A. Yes, sir.

Q. At any other points besides Mason City?

12746 A. No, I don't think so.

Q. After your mill became a basing point, I take it that then the delivered prices were made up of your base price, plus freight from Rapid City, is that right?

A. So far as our freight rate was the lowest freight rate.

Q. Yes. When you went into territory of other base point mills, did you meet the delivered prices in that territory calculated on the other basing point prices?

A. Yes, sir.

12747 Q. What proportion of the state plant's business has been done with state purchasing departments?

A. None at all.

Q. What proportion of your business, of your cement has been used in the building of state projects?

A. For instance, roads of state building.

Q. Yes, that is the type I have in mind.

A. I haven't that data, but I would say not over 10 per cent.

Q. To what classes of trade has the balance been sold?

A. To the dealer trade.

Q. Is the cement of other mills used also on South Dakota state work?

A. It is available.

Q. Is it, as a matter of fact, used?
A. Not if I can help it, no, sir.
Q. Can you always help it?
A. I have so far.
Q. When the base points were established at Rapid City in 1926, as I understand it, did that result in a lowering of your price there?
A. Yes, sir.
Q. Can you say to what extent?
A. That is when we were put on a mill base, it did.
Q. That is what I mean.
12748 A. Yes, sir.
Q. To what extent?
A. Between 60 and 70 cents a barrel.
Q. Between 60 and 70 cents?
A. Yes, sir.
Q. Did the price at other base points go down at that time to any such extent?
A. Not to the best of my knowledge.
Q. Can you say whether or not it went down at all the other base points in your vicinity?
A. Not right at that time, no, sir.
Q. Coming along a few years later, say, about 1929, was there a further reduction made in the base price at Rapid City by competing mills, out of state plants?
A. Now, I don't know about 1929. There were radical reductions made in 1930 and '31 and '32.
Q. When those reductions began, was the base price at Rapid City below the base price at other base points in your selling territory?
A. No, sir.
Q. How long did this lowering of 60 cents or 70 cents a barrel in the Rapid City price continue?
A. Well, I think probably your question is not—I can't answer your question just exactly the way you asked it.
12749 That lowering of 60 or 70 cents was because of the mere fact that we had a rate, a base point there, and it was not a matter of cement cost, but a matter of freights. You see, at Rapid City we might get into small competing towns or small towns adjacent to Rapid City at a 9 cent or 10 cent freight rate, where it might have been 30 or 35 cents from Mason City. I don't remember the exact differential. I have it with me, if you want it.

Q. As I understand it, you did have your price at Rapid City reduced to the extent of 60 or 70 cents a barrel?

A. Oh, no; no.

12750 Q. Your reference to the 60 or 70 cents a barrel reduction, which I understood you to say.

A. Will you hand me that portfolio, please? I think I can possibly do it better that way.

Q. Yes.

(A portfolio was handed to the witness.)

A. Maybe I can't. We will take—how would it be if I would take Sturgis, a small town, a town of two or three thousand people just a few miles north of Rapid City, which carries a definite freight rate? Would that answer your purpose?

Q. Well, illustrate the thing any way you like.

A. All right. The freight from Rapid City up to a few months ago, not taking the recent advance from Rapid City to Sturgis, was 10½ cents per hundred pounds. The rate from Mason City was 25 cents per hundred pounds, making it approximately 15 cents per hundred pounds. Four times 15 cents, about 59 cents a barrel. That would be the difference.

12751 Q. What was the lowest base price at Rapid City that you can recall?

A. I don't believe that I can give you that information. I can give you some information that might answer your question indirectly.

Q. All right.

A. The mill price in the district, which is eastern Missouri, Iowa, Minnesota, and South Dakota, for the year 1931, was 98 cents, and for the period 1930 was 86 cents.

Mr. Leisure: Is that average mill net you are reading? I am not quite clear.

The Witness: That is average for the district,

12752 yes, sir.

Q. Is it your average mill net?

A. That is average mill net for the district. That has no reference to ourselves, and I presume that ourselves are right with it. It generally is.

Q. Could you say whether the mill base price in effect at Rapid City was above or below that average figure that you gave?

A. I couldn't say for the reason that a great many of those prices that were made, I rather think our mill base

was higher because those prices were made very largely by the LaSalle, Illinois, mills, who had a very, very low price, and I don't think the mill base out there was changed particularly except for the purpose of meeting competition.

Q. Did the LaSalle, Illinois, mills get up into South Dakota?

A. They tried.

Q. Did they succeed?

A. Not to the best of my knowledge.

Q. Have they continued to try, or was that just during the period of low prices?

A. I haven't heard of them quoting or anything of the kind in South Dakota.

Q. Since when?

A. Since around 1931. Possibly they do. I don't
12753 know of it if they do.

Q. Do I understand, Mr. Hartley, that your plant has never initiated a price change in Rapid City?

A. Never initiated a price change of any description.

Q. How does the present base price at Rapid City compare with the base prices at other basing points in your general territory?

A. I don't care to guarantee what the other basing points are, but to the best of my knowledge, Mason City, Iowa, is $1.80, Duluth, Minnesota, is $1.80, Louisville, Nebraska, $1.85, Kansas City, Missouri, $1.70, and Boettcher, Colorado, $2.00 and—either $2.40 or $2.50. Now, whether those are right or not, I don't care to say.

Trial Examiner Norwood: As against your base price of what?

The Witness: $1.80.

By Mr. Wooden:

Q. They are all on a comparable basis?

A. Yes, sir.

Q. During what period of time was it that the base price at Rapid City was below that of other basing points in that general territory?

A. It never was.

Q. Wasn't there some time during 1929 or 1930 where the price at Rapid City was less than at other basing points?

12754 A. Not to the best of my knowledge, no, sir.

Mr. Zimmerman: Do you mean other basing points in the sales territory of the South Dakota mills?

Mr. Wooden: Yes.

The Witness: I don't think so.

By Mr. Wooden:

Q. I am directing your attention to a report of the Federal Trade Commission on its price bases inquiry of March, 1932, page 127. After looking at that, can you say whether or not there was a time during 1929 or 1930 when the base price at Rapid City was below that of nearby basing points?

Mr. Leisure: Your Honor, before the witness is shown some exhibit that he hasn't said that he ever had anything to do with, and asking him to change his testimony on that, there should be some showing that he had some connection with the exhibit in some way.

Trial Examiner Norwood: I thought he was going to—

The Witness: I can answer that question very readily without any prejudice.

Trial Examiner Norwood: —ask about some statement of his in there.

The Witness: I can answer this question without any prejudice to anybody.

12755 Mr. Zimmerman: Well, it wasn't so much that we were afraid of prejudice. It was simply this, that I felt and still feel that Mr. Wooden was asking the witness to go beyond his own knowledge and to read something that appeared in the brown book, and then state whether or not it was correct.

The Witness: It is not beyond my knowledge, but I had just forgotten that particular circumstance, and I remember it very distinctly now.

Mr. Zimmerman: You mean, you can say—

The Witness: I can answer the question.

Trial Examiner Norwood: Objection overruled. I should not let him testify from that book—

Mr. Zimmerman: Well, that is my objection. I think he should not do so. If he were present at the mill at that time and connected with it and knew of his own knowledge what was going on, he might ask him that.

By Mr. Wooden:

Q. Can you answer the question of your own knowledge, Mr. Hartley?

A. Yes, sir.

Q. Will you do so?

A. At one time, some time in 1929, some mill, who, I don't know, started a new discount policy which carried a dealer discount and a cash discount, making 20 cents
12756 a barrel cash or 20 cents discount if paid within 15 days. And we never did that. Consequence was that on the face of our mill base, which was $1.70, with the one discount of 10 cents a barrel, and the other fellow's price was $1.80 with two discounts of 10 cents each, making the net the same. I had forgotten that, Mr. Wooden. That is the reason—

Q. Do you recall any time when the Northwestern States plant at Mason City increased its delivered price without making any change in the Rapid City base?

A. Yes, there was such a time. I wouldn't say it was the Northwestern States, but there was such a time that that was done.

Q. When was that?

A. Oh, I wouuldn't want to place the year.

Q. Since 1930?

A. Well, back there somewhere, seven or eight, nine years ago.

Q. When you say you wouldn't say that it was Northwestern States, would you say that it was the Mason City mills?

A. I would say that it was the Mason City base.

Q. All right. Where the Northwestern States and the Lehigh have plants; is that correct?

A. Yes, sir.

12757 Q. How long did that condition exist?

A. A very short time; as I remember it, a very short time.

Q. What do you mean by a short time?

A. Yes.

Q. What do you mean by a short time,—how short?

A. Maybe a few weeks.

Q. Do you have here cement quotations that you picked up from various dealers showing the prices quoted by other mills at various points?

A. I have some, yes, sir.

Q. What period do you have them for?

A. 1929 to—well, until—I don't know that I have any '38's or not. I don't think I have any in the files.

Q. Will you let me see the papers you refer to?

The witness identified Com. Ex. 2221 A and B as a photographic reproduction of the front and back of an
original quotation which the witness produced, the
12758 same, being a quotation of the Ash Grove Lime & Portland Cement Company.

Mr. Wooden: I will offer, your honor, the papers 2221-A and B, and submit the original for checking, with the expectation that that will be returned to the witness.

Mr. Ieisure: No objection.

Mr. Zimmerman: I don't have any.

(COM. EX. 2221-A and B was offered and received in evidence.)

The witness identified Com. Ex. 2222 A and B
12759 as photographic reproductions of the front and back of an original quotation of the Northwestern States Portland Cement Company, dated January 16, 1930, which the witness brought.

Mr. Wooden: I will offer those in evidence and submit the original for checking purposes, asking that it be returned to the witness.

Mr. Leisure: No objection.

(COM. EX. 2222-A and B was offered and received in evidence.)

Q. Are the papers I hand you, marked 2223-A and B,
for identification, a photographic reproduction of
12760 an original quotation of the Nebraska Cement Company, which you have produced here today?

(Handing documents to witness)

A. Yes, sir.

Mr. Wooden: I will offer those in evidence and submit the original for checking, asking that the original be returned to the witness.

Mr. Leisure: No objection.

Mr. Zimmerman: No, I have no objection.

(COM. EX. 2223-A and B was offered and received in evidence.)

12761 Q. What is the paper marked 2224, for identification?

(Handing document to witness)

A. This is a price quotation to the Burgi Lumber Company, Yankton, South Dakota, from the Nebraska Cement Company.

Mr. Wooden: I will offer that original in evidence, your honor, including both sides of the printed paper.

Mr. Leisure: The others were marked as two exhibits, A and B. Wouldn't it be better to mark both sides of this paper individually?

Trial Examiner Norwood: Not if it is one sheet.

Mr. Withrow: He is offering the front and back, your honor.

Trial Examiner Norwood: Well, I guess that might be done.

Mr. Leisure: And we have no objection.

Trial Examiner Norwood: It might be very well to make them A and B.

(COM. EX. 2224-A and B was offered and received in evidence.)

12762 Q. What is the document marked 2225-A and B, for identification?

(Handing document to witness)

A. A price quotation from the Monarch Cement Company, Humboldt, Kansas, to—it says "Doyler, D-o-y-l-e-r." It should be Doyle & McMillan, Thedford, Nebraska.

Q. These various quotations that you have identified, how did they come into your possession?

A. My salesmen picked them up. Occasionally they are sent to me by the dealers.

Mr. Wooden: I will offer this, No. 2225-A and B.

Mr. Leisure: Mr. Wooden, are you offering the pencil memorandum that is on this or just the printing?

12763 Mr. Wooden: I didn't notice any.

Mr. Leisure: There appears to be a pencil memorandum.

Mr. Wooden: No, I am not.

Mr. Leisure: You are just offering the printed matter?

Mr. Wooden: Yes.

Mr. Leisure: We have no objection.

(COM. EX. 2225-A and B was offered and received in evidence.)

Cross-Examination by Mr. Leisure.

Q. Mr. Harley, in regard to that price when the base was put on at Rapid City, the difference of 60 or 70 cents, I

don't recall whether you told us the price per barrel prior to that time?

A. I don't think that was just the way the question was asked. I wonder if you can get that question?

Q. No, I wanted to ask you if you did not tell us what the price per barrel was before that time. Do you know?

A. No, I think the inference was in the question
12764 as to whether the opening and operating of the cement plant at Rapid City changed the price at Rapid City, and it necessarily did just the amount of the freight.

Q. Now, I wanted to get the price per barrel before the base was put on there. Can you give us that?

A. Before our base was put there?

Q. Before your base was put there.

A. I couldn't give you that, I don't remember, but I think back in 1925 the Mason City base price was $1.90. That is during the early part of 1925.

Q. And the price per barrel after it was put on, the base price?

A. That was the base price.

Q. Was $1.80?

A. Was $1.90 in 1925.

Mr. Zimmerman: You are not talking about the same thing.

The Witness: I guess we are talking about different things.

By Mr. Leisure:

Q. I think you told us the base that was put on was $1.80; isn't that true?

A. No, I don't think I told you what it was. I don't think that question came up. As a matter of actual fact, I don't remember.

12765 Q. You don't remember?

A. No, but that would be my guess, would be $1.80. I think that is what it was.

Q. Do you recall, regardless of the base, can you tell us the price per barrel at which cement was being sold by your mill prior to the time,—in Rapid City prior to the time the base was put on?

A. No, I couldn't tell you now. I can tell you by checking back.

Q. Can you give me approximately the price?

A. I wouldn't want to do that, because I might be way off. I can get you the information in ten minutes in the

office, but I don't think it is any material change from right today, the $1.80 base.

Q. Now, you told us, Mr. Hartley, that in selling in certain places, commercially you sold at competitive prices. What is your practice with bags? When they are returned, do you pay the freight on the return of your bags?

A. Yes, sir.

12766 Q. And do you find that your competitors do the same thing?

A. So far as I know, they all do; that is, on cloth sacks.

Q. In other words, you are more or less forced to pay the return on the bags, and your competitors do, if you want to sell; is that correct?

A. Yes, sir.

Q. Now, about shipment in split cars. Do you ship in split cars when you have to?

A. What do you mean by that, please?

Trial Examiner Norwood: Less than a carload.

A. (Continuing) You mean ship one carload and split it among two or three dealers?

By Mr. Leisure:

Q. I mean, that is a general term, you split cars?

12767 A. Yes.

Q. Of lime, brick, and other things?

A. Yes, sir.

Q. Isn't that general language?

A. Yes, sir, we do that.

Trial Examiner Norwood: That is, a whole car—

The Witness: But it must be—

Trial Examiner Norwood: Part cement and part something else?

Mr. Leisure: Yes.

The Witness: No. Pardon me. With us it must be a minimum car of cement, and then they can put what lime, plaster, or any commodity that we happen to sell on top of that, but it must be a minimum car of cement.

By Mr. Leisure:

Q. Yes. You would ship, though, with that kind of a shipment a half a car to each of two dealers, would you not?

A. Yes, providing they were in a freight rate that would allow it.

Q. That is what I mean. Do you find that your competitors do the same thing?

A. Yes, sir.

Q. Do you use the Institute freight books, Mr. Hartley?

A. No, sir. We have them.

12769 Q. Now, as to the sales, do you always get a satisfactory return on the sales?

A. Pretty good, quite satisfactory except in '31 and '32.

Q. And during that period of time, were you meeting competitive prices?

A. Yes, sir.

Q. At lower prices?

A. Yes, sir.

Mr. Leisure: Thank you, Mr. Hartley.

Trial Examiner Norwood: Anything further?

By Mr. Zimmerman:

Q. Do you have dealers to whom you regularly

12770 furnish your brand of cement?

A. Yes, sir.

Q. Roughly speaking, how many?

A. 450.

Q. Do you have any particular policy with reference to whom you sell direct and to whom you do not?

A. Yes, sir.

Q. What is that?

A. Dealer distribution on everything except the highway paving and a few Federal jobs like the Bureau of Reclamation or dam work.

Q. Well, now, is that a policy which you have always followed?

A. We have, yes, sir.

Q. Does that differ materially from the policy followed by other competing cement companies?

A. I wouldn't care to answer that because . don't—

Q. So far as you know?

A. So far as I know, yes.

Q. I wouldn't want you to go beyond that.

Have you any agreement with other cement companies or did you ever make an agreement with other cement companies relative to the establishment of your sales policy?

A. No, sir.

Q. Did you consult with any other companies as to the manner of formulating your sales policy?

12771 A. No, sir.

Q. It was done entirely independently?

A. Yes, sir.

Q. Now, do you sell direct to dealers on all WPA jobs or do you sell to WPA and similar institutions directly?

A. Sell to the dealers. Sell only to the dealers.

Q. You sell only to dealers?

A. Yes, sir.

Q. Do you sell generally at delivered prices?

A. Entirely.

Q. Always have?

A. Yes, sir. Oh, there is an occasional—there is an occasional Federal bid will come in—

Q. Where you would sell f.o.b. mill, where there is a land grant rate involved?

A. There was one came in my office Tuesday. That is for the little town of Bellefourche.

Q. Yes.

A. From the Bureau of Reclamation. And it is 50 miles north of us, and if we bill it delivered price, we must necessarily prepay the freight on those people—

Q. I see.

A. —on those jobs, and these people at Bellefourche don't want to monkey with any freight bills, so we—rather, don't want us to have them. They want their own
12772 freight bills. So that particular job we billed f.o.b. plant, but it is not the practice.

Q. Do you find outside of those instances that your customers prefer to have you sell to them or quote to them in delivered prices?

A. They insist on it.

12773 Q. My memory is that you stated that the putting of a base on your mill reduced the prices at your mill by some 60 or 70 cents per barrel. Is that the statement or did I misunderstand you?

A. No; no, sir. That is what I think I explained to this gentleman over here.

Q. I wasn't quite clear on it. That is the reason I brought it up.

A. It was the establishment of the mill at Rapid City that reduced freight to that extent Otherwise, they would have taken it at Mason City rate.

Q. By reducing freight, you mean that you had a mill—

A. Right close.

Q. Which could—

A. With a low freight rate.

Q. Which could deliver with a lesser freight charge?

12774 A. Yes, sir.

Q. Being closer to the point of use?

A. Yes, sir; we did not cut the price.

Q. And the result of that was that the general price there was reduced to that extent?

A. That is right.

Q. Do you or do you not in general endeavor to make your price as low as any price quoted by any competing mill?

A. Yes, sir, we do, necessarily so.

Q. And the result is that your prices quoted are in most instances exactly the same as those quoted by your competitors?

A. That is our intention.

Q. Yes. Your discounts and your allowances on bags are, so far as you know, the same as your competitors?

A. So far as I know, yes, sir.

Q. And so far as you know, all of your price terms and conditions are the same as your competitors?

A. So far as I know, yes, sir.

Q. But there is nothing about your business in any way that is due to any consultation with or agreement with any other concern in the cement business; is there?

A. No, sir.

Mr. Zimmerman: Thank you. That is all.

Trial Examiner Norwood: How do you meet the exact price of your competitors when you bid f.o.b.

12775 mill?

The Witness: Well, we don't bid f.o.b. mill, sir, except on one or two Bureau of Reclamation jobs.

Trial Examiner Norwood: What is your experience in those special cases?

The Witness: Well, you just have to back-track. That is about the best way I can explain it. You take your mill price plus your freight.

Trial Examiner Norwood: Yes.

The Witness: And that will make your delivered price. Then you don't need to put that freight on and just sell it to them at mill price, and that will make that delivered price.

Trial Examiner Norwood: Did you make an f.o.b. mill price then that figures the same as the delivered price of your competitors?

The Witness: Yes, sir, but you can't do that very often.

Mr. Zimmerman: Well, the delivered price of your competitors is less than the freight, I assume.

Trial Examiner Norwood: No, no, I didn't mean that.

The Witness: The ultimate result is the same.

Mr. Zimmerman: Well, I will ask:

By Mr. Zimmerman:

12776 Q. What you mean is, that you simply adjust the price which you bid at your mill, so that taking into consideration the cost of transportation to the destination, the destination cost will be the same as your competitor?

A. If that particular piece of work and that particular cement is to be shipped in our freight territory.

Q. Yes, sir.

A. That price today is $1.80 plus containers at the mill, and they pay the freight.

Q. Yes, I understand that. But we are talking about these f.o.b. mill prices that from time to time in some instances are made. In those instances you would endeavor to find out what quotations have been made at or substantially at the destination that you are investigating by your competitors. Then you would deduct the freight from the delivery point to your competitor's mill, and you would try to find the one that would have the lowest cost at the destination. You would adjust your f.o.b. mill price, taking into consideration the cost of transportation from your mill to that particular destination, so that the destination costs as between you and your lowest competing competitor would be the same?

A. Exactly.

12777 *Redirect Examination by Mr. Wooden.*

Q. Do I understand, Mr. Hartley, that you have not followed the method of distribution as to classes of trade outlined in this Exhibit 2197-A to F?

A. Not entirely, no, sir, we haven't.

Q. Referring to Mr. Zimmerman's question about ascertaining what quotations had been made when you bid

f.o.b. mill and figured out your mill price by deducting freight where sealed bids are being taken, what basis do you have to go on there?

A. Wouldn't have any.

Q. Then how do you handle it in such case?

A. Shut your eyes, I guess. You jump in the dark. That is the only thing I know to do.

Trial Examiner Norwood: These bids that you
12778 made to the Government, have you found that your bids have been identical with those of your competitors?

The Witness: Oh, no, not in any sense of the word; no, no.

By Mr. Wooden:

Q. Did you say in answer to Mr. Zimmerman's question, you try to make your delivered prices at particular destinations as low as that of your competitors?

A. We try to, yes, sir.

Q. You do not try to make them any lower than your competitors?

A. No, sir.

12783 *Recross-Examination by Mr. Zimmerman.*

Q. You say you do not use the Institute freight rate book, but maintain your own freight department?

A. We have theirs, but we have our own book which we use.

Q. That you made up from the railroad tariffs?

A. Yes, sir.

Q. You find that entirely sufficient for your purpose?

A. Yes, sir. We don't need all the big list of mills that some of the companies do.

12785 Chicago, Illinois,
December 16, 1938.

12786 I. D. ROYAL resumed the stand, having been previously sworn, and testified further as follows:

Direct Examination by Mr. Wooden.

Q. Mr. Royal, in the course of your investigation of the cement industry for the Federal Trade Commission, did you call upon the Hawkeye Portland Cement Company?

A. I did.

Q. Where is it located?

12787 A. Des Moines, Iowa.

Q. Whom did you see there?

A. I talked with Mr. C. A. Condon, C-o-n-d-o-n.

Q. Is that C. A. or C. D.?

A. I wouldn't be sure of his initials.

Q. Who was he?

A. He was general manager and general sales manager.

Q. Will you state on what occasions or occasion you called on Mr. Condon?

A. I called on him in 1931, 1933 and 1936.

Q. Were those visits occasioned by the three types of investigation that you have already described in the case of other visits and interviews that you made?

A. They were.

Q. Did you examine any files at the Hawkeye Company's plant?

A. I did.

Q. Were selections made by you from the files?

A. Yes.

Q. And did Mr. Condon allow you to have copies made of those selections for your files?

A. He did.

12788 The witness identified Com. Ex. 2226, 2227-A and B, 2228 and 2229 A and B as photographs of material in the files of the Hawkeye Company given to him by Mr. Condon on the occasion of his visit in 1931.

Mr. Wooden: I offer these papers in evidence.

(The exhibits referred to were handed to Mr. Leisure by Mr. Wooden.)

12789 Mr. Wooden: While the papers are being examined, I would like to ask Mr. Royal one further question about them:

Did you show Mr. Condon the papers that you selected as a result of your examination, and of which these numbered exhibits, for identification, are copies?

The Witness: Yes, he examined each one.

12789-90 *Voir Dire Examination by Mr. Leisure:*

"That" is a photograph of a carbon copy of a letter found in Mr. Condon's files. The witness doesn't think that Mr. Condon stated specifically that the letter was from him.

Mr. Leisure: Your Honor, here is a letter which counsel things is a reply to 2228-A. Now, I will be glad to let it go in subject to check. I want to check it with Mr. Condon to see if he wrote it. We won't make any objection otherwise. I will reserve my objection.

Mr. Wooden: Condon's letter treats with the same subjects that the other letter does.

Mr. Leisure: Now, we have met with a difficulty. I am just informed that Mr. Condon is deceased. We will check with the files and if we can find that Mr. Condon did write the letter, we will make no objection.

Trial Examiner Norwood: Yes.

Mr. Leisure: And we make the same reservation as to 2227-A. It is not signed and there are no initials on the letter. It will be necessary for us to check it.

12791 Trial Examiner Norwood: Yes, all right.

Mr. Leisure: As to 2226, we have no objection.

Trial Examiner Norwood: Show these to the other counsel.

(The documents referred to were handed to counsel.)

Trial Examiner Norwood: This is off the record.

(A discussion ensued off the record.)

Trial Examiner Norwood: Any further objection?

Mr. Zimmerman: No, I think not.

(COM. EXS. 2226, 2227-A and B, 2228 and 2229-A and B were offered and received in evidence.)

12792. The witness identified Com. Ex. 2230 A and B as tabulations of Illinois bids made by the Hawkeye Company. The tabulations were given to the witness by

Mr. Condon in June, 1933. "Those" are tabulations of the bids made by the Hawkeye Portland Cement Company to the Highway Department of the State of Illinois. The bids were not submitted [in] that way. It is a tabulation showing details of the bids. The witness asked Mr. Con-
12793 don for tabulations showing details of "their" bids in February of 1933 to the State of Illinois. This is a tabulation that was already in their files; Com. Ex. 2231 is a tabulation showing details of the bids by the Hawkeye Company to Iowa in November, 1931, and also bids made on August 16, 1932, to the State of Iowa.

Voir Dire Examination by Mr. Leisure.

12794 The witness got both exhibits, Com. Ex. 2230 A and B and 2231, from Mr. Condon at the same time; Com. Ex. 2230 A and B [were] tabulations of details on "their" bid, which were in "their" files. Those were not in "their" correspondence files. He had to ask for those as tabulations of details of bids. They were already made up, and tabulation of bids is the description that the wit-
12795 ness gave them. He asked Mr. Condon for tabulations of details of "their" bids and those, Com. Ex. 2230 A and B, were given to him in at least part compliance with his request. The witness asked him for tabulations of—tabulations showing details of their bids to Iowa, and the witness thinks that he specified the details. The witness thinks those were in the files, at least, already made up. The witness didn't take them from the files.
12796 The witness wouldn't be sure whether those two smaller ones were made up for him as a result of his request or whether they were in the files before he went there. The witness thinks they were found in their files and given to him and were already prepared. The witness thinks "they" took them from their files and gave them to him in compliance with his request for tabulations of details of the bids.

12797 *Examination by Mr. Wooden.*

"They" gave the witness those papers right there. The witness thinks those came from their files. There is 1931 and 1932 here. His best recollection is that they were already in their files and were given to him as a tabulation

which was already made up showing their bids. It is his best recollection that they had a tabulation on two separate years on the same sheet of paper in their files and gave it to the witness and not as a result of his request.

Trial Examiner Norwood: Any objection?

Mr. Leisure: No objection.

Mr. Zimmerman: No.

Trial Examiner Norwood: Received as marked, 2230-A and B, and 2231.

12798 (COM. EX. 2230-A and B and 2231 were offered and received in evidence.)

The witness identified Com. Ex. 2232 as a sample of a form of quotation obtained from the Hawkeye Portland Cement Company in June of 1933.

Mr. Wooden: I offer it in evidence.

Mr. Leisure: No objection.

(COM. EX. 2232-A and B was offered and received in evidence.)

12799 By Mr. Wooden:

Q. Did you have a conversation with Mr. Condon on the occasion of your 1933 interview with regard to his Illinois Highway bidding?

A. Yes, I did.

Q. Will you state what you and he said about that?

A. (Referring to memorandum) I asked him if they bid the current market prices, and he stated that their bids in February of 1933 in Illinois were higher, they knew, than the current market quotations in a great many of the counties.

Mr. Zimmerman: If the Examiner please, may I ask what the witness reads from?

Trial Examiner Norwood: Is the witness reading?

The Witness: I am reading from notes made, or, copies of notes made from my interview at the time.

Examination on Voir Dire by Mr. Zimmerman.

Q. That is to say, that is—

A. A copy of notes made at the time.

Q. You say you are reading now from something

12800 that you made at the time?

A. No, a copy made.

Q. When was the thing made that you are reading from now?

A. Yesterday.

Q. And that was made from some other written instrument?

A. Made from notes made at the time.

Q. That are in the possession of counsel for the Commission?

A. They were made from my notes which were—I take notes partly in shorthand and partly in writing.

Q. Yes, but—

Trial Examiner Norwood: And your notes are made right after the interview?

The Witness: Right at the time.

By Mr. Wooden:

Q. Will you finish your statement, Mr. Royal?

A. I beg your pardon?

Q. Will you finish your statement that you were making when interrupted?

Trial Examiner Norwood: I ask you to refresh your memory from that paper, but not to read it. Refresh your memory and answer his questions independently of the paper.

Mr. Zimmerman: Well, it doesn't seem to be a question of refreshing his memory. If the witness is queried
12801 as to what was said and what was done, and as to what he can remember, then counsel may ask him to refresh his recollection from a note or memorandum made contemporaneously. That is not the procedure here. The procedure here is that there is a memorandum which he has in his lap, which he reads, and which was not and does not purport to be a thing that was made contemporaneously with the conversation he is discussing.

Trial Examiner Norwood: I think it is substantially.

Mr. Zimmerman: There is no showing that it is. In fact, the showing is to the contrary. I mention that only because it is a practice that sets a precedent that ought not to follow.

Trial Examiner Norwood: I don't follow the counsel on that point. I have instructed him to refresh his memory from these notes and to testify independently of them. You may do that and the notes themselves should be admissible.

Mr. Zimmerman: We should have the original notes he made available.

Trial Examiner Norwood: You may see them.

Mr. Zimmerman: But they are not here.

Trial Examiner Norwood: Here they are (indi-
12802 cating).

Mr. Zimmerman: No, if you please, these do not purport to be the notes that he made at the time. The thing that he now reads from are not the memoranda that he made contemporaneously.

Mr. Wooden: The witness may refresh his memory from anything, and you are entitled to see anything he refreshes his recollection from.

Mr. Zimmerman: Well, I do not agree that that is the accepted procedure, the usual, customary procedure and is not the correct procedure.

Trial Examiner Norwood: Anything he has connected with it in such a way would entitle him to refresh his recollection from it. That is paradoxical.

Mr. Zimmerman: Is this correct, that if the witness has exhausted his memory—

Trial Examiner Norwood: Yes.

Mr. Zimmerman: —and desires to refer to notes made contemporaneously with the matter concerning which he does not remember, that those notes should be produced, and if he comes in with those notes, those are the notes we have the right to inspect?

Trial Examiner Norwood: Well, he will produce these that he is going to refresh his memory from, and that is all I am going to ask him to produce, and you may see them right now, if you want.

12803 Mr. Wooden: I don't think he is entitled to see them before cross examination.

Trial Examiner Norwood: Oh, I think he is entitled to see them before the witness proceeds any further.

Mr. Zimmerman: Yes, sir.

(The notes referred to were handed to Mr. Zimmerman.)

Mr. MacIntyre: Off the record, please.

Trial Examiner Norwood: Off the record.

(A discussion ensued off the record.)

Mr. Zimmerman: Now, the witness has handed me here some odd-sized pieces of paper, on which the referred to notes appear, and I would like to ask him a question or two concerning them.

Trial Examiner Norwood: Go ahead.

By Mr. Zimmerman:

Q. When did you make, if you did make these pieces of paper, these notes on the pieces of paper that you just now handed to me?

A. Last night and the night before.

Q. And from what did you make them?

A. From notes made at the time of the interview.

12804 Q. Where are the papers from which you made the notations that you have produced here just now?

A. I can't answer that question.

Q. Why not?

A. I don't know exactly where they are.

Q. Well, where are they to the best of your knowledge? Where were they when you last saw them?

A. The only answer I can make to that is that these were made because—

Q. I am not asking you why you made them; I am asking you a simple question as to where the papers were from which you made these notes that you have produced here.

A. They are in the files.

Q. What files?

A. I think that they have partly been reduced to writing and are in the files that are present in this case, and they are probably some of them that I have had in shortland.

Q. When you get ready, you tell me where they were.

Trial Examiner Norwood: Let him finish.

Mr. Zimmerman: He isn't answering my question.

Trial Examiner Norwood: Let him finish. Go ahead.

A. The notes were put in the form of typewritten statements, and I have not possession of them.

By Mr. Zimmerman:

Now, will you read the question, Mr. Reporter?

12805 (Question read.)

Trial Examiner Norwood: Where were they when you made the notes?

By Mr. Zimmerman:

Q. That is, made the excerpts or notes that you have produced here this morning.

A. These notes that I have were made partly from recollection. Part of that recollection was independent of anything else; part of it was refreshed by written memorandum made at the time.

12810 *Direct Examination (Resumed) by Mr. Wooden.*

Q. I believe you were testifying, Mr. Royal, about the conversation of Mr. Condon about the Illinois bidding of his company in 1933.

A. Yes.

Q. I believe you had reached the point where you were talking about the number of counties in which his company had bid.

Will you finish your statement from that point?

A. The Hawkeye people knew they were high in many of the Illinois counties judging from commercial prices, and, therefore, in the last two bids of 1933 they
12811 omitted to bid in 73 of the Illinois counties.

Q. Did you have any conversation with Mr. Condon on that occasion with regard to whether he had bid F. O. B. mill on the Illinois highway requirements?

Mr. Zimmerman: If the Examiner please, may I see the notes that the witness is now referring to?

Trial Examiner Norwood: Certainly.

The Witness: You just saw them, but you can see them again, of course.

Mr. Zimmerman: Let me see them again.

(Paper writings were handed to Mr. Zimmerman by the witness.)

Trial Examiner Norwood: I have instructed the witness not to read from that paper.

Mr. Zimmerman: That is what he has been doing.

Trial Examiner Norwood: Yes, but he must not do it any more.

The Witness: Mr. Examiner—

Mr. Wooden: You are not instructing him not to refer to the paper, are you?

The Witness: Mr. Examiner, I was merely referring—

Trial Examiner Norwood: He may refer to it but not read into the record from it. That is what I mean.

The Witness: I was not doing that.

Trial Examiner Norwood: Read the question.

12812 (Question read.)

A. I did.

Mr. Leisure: Now, just a moment. Counsel is reading something there. I don't see how he can—

Mr. Zimmerman: That is all right. He can go ahead. I won't hold him up.

By Mr. Wooden:

Q. Will you state—

A. Mr. Condon said that—

Q. —what it was?

A. —that he did not bid on the F. O. B. mill plan as requested in the alternate bids of Illinois.

Q. Did you ask him why he did not?

A. He said that it would—

Mr. Leisure: No, that is not the question. The question was, "Did you ask him why?"

A. I asked him, yes, sir.

By Mr. Wooden:

Q. What did he say?

A. He said that it would have disrupted the entire price structure, and that he did not want to run any risk of doing that, and, therefore, they did not bid F. O. B. mill.

Q. Now, did you call again on Mr. Condon in 1936?

A. Yes.

Q. What did you do on that occasion?

12813 A. I asked Mr. Condon at that time how they made up their delivered price in Des Moines. I also asked him what the price was, the then market price in Des Moines.

Q. Will you state what he told you?

A. He told me they took a Mason City base price of $1.70. They added 40 cents for sacks, 47 cents for freight, which made a delivered price in Des Moines of $2.57.

Q. Go ahead, if you are not through.

A. He said—

Trial Examiner Norwood: You may have those notes if you want to refer to them.

The Witness: Well, I thought counsel preferred—

Mr. Zimmerman: Does the witness need them?

Trial Examiner Norwood: I said he may have them if he needs them.

Mr. Zimmerman: Yes, certainly.

The Witness: I need them for the purpose I was using them for before, to refer to them occasionally to refresh my mind.

(Paper writings were handed to the witness by Mr. Zimmerman.)

By Mr. Wooden:

Q. Go ahead.

A. He said that it cost them 8 cents to get their cement from their mill into Des Moines.

12814 Q. Where was the mill?

A. Beg your pardon?

Q. Where was the mill?

A. Well, it was about ten miles out of the city of Des Moines, and he said in that way the Hawkeye mill had a freight advantage of 39 cents, and that gave them a better mill net; in fact, a mill net of $2.09.

Q. In Des Moines?

A. In Des Moines.

Q. Did you have any conversation with Mr. Condon on that occasion with regard to the cost of selling State highway business?

A. I did.

12815 Q. What did you say and what did he say?

A. Mr. Condon said it was an advantage to sell to the state, because of the lower cost of selling, and it was an advantage in another way, that they avoided selling to customers of poor credit rating from whom they might be unable to collect.

Q. Did you have any conversation with Mr. Condon with regard to the terms or conditions under which his mill would deliver to dealers' trucks?

Trial Examiner Norwood: Well, I think counsel can make us much happier if he will reframe the question. The objection is sustained.

12816 Mr. Wooden: I am frankly at a loss how to ask a question that will bring out that fact.

Mr. Zimmerman: If the Examiner please, he might suggest that the witness look at the notes in his hand and direct his attention to the particular paragraph in the notes. That would be one way of doing it.

Trial Examiner Norwood: That is off the record.

Mr. Zimmerman: No, that is exactly what I mean, and I think that is exactly the situation. The witness has made notes upon all of these subjects. He has cut them to fit the palm of his hand.

By Mr. Wooden:

Q. All right, Mr. Royal, do you find—do you have any notes regarding the subject of trucking, of delivery to dealers' trucks with regard to Mr. Condon's interview?

A. I possibly have a note on that, but I think I remember that conversation without notes.

Q. All right, go ahead and tell us what it was.

A. Mr. Condon was asked if they sold and had cement hauled in trucks to customers.

He said they only sold to dealers,—they only delivered to trucks which were dealers' trucks sent to get the load; they had changed the policy in regard to trucking very recently and found that they might be subject to liability for accident or loss if they allowed commercial
12817 truckers to take deliveries from their mill. He said the rate or the price charged to the customer for cement hauled by truck was the Mason City base price, plus the freight to the customer's town, from which was deducted the freight from Des Moines to the customer's town.

The witness identified Com. Ex. 2233 A and B, 2234, 2235 and 2236 as copies of material in the files of the Hawkeye Portland Cement Company, which were furnished to the witness by Mr. Condon in the summer of 1936. Mr. Condon saw these selections that the witness made.
12818 "These" are copies made for the witness at Mr. Condon's office.

Mr. Wooden: I offer them in evidence.

Trial Examiner Norwood: Have you any objection?

Mr. Leisure: Your honor, I think we should have some showing as to the relevancy and materiality of these exhibits. The subject matter doesn't appear to be anything connected with any of the issues that are raised. I think we should have some statement as to how counsel feels they have any connection with the case.

Mr. Wooden: I would be very glad to state it. There is a paragraph in the complaint, your honor, charging the respondents with seeking to camouflage their alleged combination and convince the public and public officials by propaganda that they are operating in a competitive way in their pricing, and it is charged that that is false and misleading, and these papers relate to some efforts of some respondents to carry out that program.

12824 Q. Mr. Royal, did you have an interview on any of your investigational trips on cement with officials of the Ideal Cement Company?

A. Yes, I did.

Q. Will you state who they were and when the interview was held?

A. I held an interview in June of 1931 with Mr. Charles

Boettcher, president of the Ideal Cement Company, and the Colorado Portland Cement Company.

Q. Was that in connection with your investigation under the Senate resolution?

A. It was.

Q. Will you state whom you saw there?

A. I saw Mr. Boettcher and Mr. H. O. Warner, a vice-president, and Mr. Morse, another vice-president.

Q. What did you do there?

A. I made an examination of some of their files of correspondence and interviewed them in connection with the Senate resolution.

Q. Did you make inquiry of them as to the relationship between the various companies and the Ideal Cement Company, the corporate relationship?

A. I did.

12825 Q. Will you state what you were informed on that subject?

A. I was told that the Ideal Cement Company was a holding company owning all of the stock of the Nebraska Cement Company, Colorado Cement Company, the Arkansas Cement Company, the Oklahoma Cement Company, and I think that was all of them, although there might have been another one.

Q. Did you mention any concerns in Utah or Montana?

A. The Utah Cement Company was another one of them, and the Montana Cement Company.

Q. Are you sure about the names as you have given them, or just their location?

A. Well, the one in Montana had mills at Trident and Hanover, Montana, and the Utah Company had a mill at Devil Slide, Utah.

Q. Did you ever hear of the Three Forks Portland Cement Company?

A. Three Forks is the one operating in either Montana or Utah.

Q. Did you ever hear of the Union Portland Cement Company?

A. Yes, Union is the one that is operated in one of those two places.

Q. Were you informed that those companies were part of the Ideal chain of mills?

A. I was, and the stock was all owned by the Ideal Cement Company.

12826 Mr. Leisure: Suppose you do not lead him, Mr. Wooden? Just ask him what he did and what he said.

Mr. Wooden: Well, I thought those particular points were pretty well known anyway.

Direct Examination by Mr. Wooden.

The witness identified Com. Exs. 2251 A-B, 2253 A-B, 2254 A-B and 2256 A-B as photographs of material from the Ideal Cement Company files supplied by Mr. Boettcher and Mr. Warner in the summer of 1931. He made the selections from the files of which these papers are copies, and he showed the selections made at the time to Mr. Boettcher and Mr. Warner who permitted him to have copies made.

12827 Trial Examiner Norwood: Any objections?

Mr. Leisure: Yes, your Honor, we object to all of these as being incompetent, irrelevant and immaterial. They are very remote. They go back to 1929 and 1930. They state conclusion of witnesses and discussions. If the witnesses themselves were on the stand they would not be allowed to give testimony that is contained in these documents. Many of them are mere interoffice communications, and there is no showing that the authors were authorized to bind any one, even their own company, in these discussions which they are carrying on in this correspondence. Many of them are in the nature of personal letters, and they are not within the scope of their official duties in any way.

I call particular attention to Commission's Exhibit 2250. It is not addressed to any one and it is not signed by any one, and I submit that it couldn't possibly be binding on any respondent.

12829 Q. Mr. Royal, in your interview with Mr. Boettcher and Mr. Warner, did you make any inquiry as to the relationship of Mr. Boettcher to these various companies that you named?

A. Mr. Boettcher was—

Q. You had better answer the question yes or no, first.

A. Yes, I did make such an inquiry.

Q. What did Mr. Boettcher give you as to information on that?

Mr. Boettcher said that he was the chief executive of all of the companies.

Q. Did you inquire of Mr. Boettcher concerning his interests in the companies other than the ones of which he was chief executive?

A. Yes, I did.

Q. Will you state what you asked and what information you received from him in that respect?

A. I did.

By Mr. Wooden:

Q. Will you state what Mr. Boettcher told you
12830 in that respect?

A. Mr. Boettcher told me that he was a stockholder in the Alpha Cement Company and that his son, C. K. Boettcher, was a director, and that he was a stockholder in the Southwestern Portland Cement Company in California.

Q. Did he give you any information as to the extent of his holdings there?

12832 A. I think Mr. Boettcher said he had a one-twentieth interest in the Southwestern Portland Cement Company.

By Mr. Wooden:

Q. Do you have any notes in your possession concerning that matter?

A. Yes, I have.

Q. Will you please refer to them and state whether or not you are correct in your last statement?

A. (Referring to memorandum) The one-twentieth stock that he owned was in the stock of Alpha.

Q. How about Southwestern?

A. He said he owned 35 per cent of the common stock of the Southwestern Portland Cement Company.

Mr. Boettcher said that he was a small stockholder in the Lehigh, and he had been a stockholder in the Atlas Cement Company but received United States Steel stock in exchange for that stock, when it took over the Atlas and made the Universal-Atlas Cement Company out of it.

Q. Was there any other company that he mentioned as being a stockholder of?

A. He was a stockholder in the Oregon Portland Cement Company, and I think he said he built the mill that they had first operated in Oregon.

Q. Now, Mr. Royal, did you ever have an interview

with Mr. Hjerpe of the Consolidated Cement Corporation?

12833 A. I did.

Q. Will you state where and when?

A. In 1931 and in 1933, in Chicago.

Q. Did you ever discuss with Mr. Hjerpe then—or, who was Mr. Hjerpe?

A. Mr. Hjerpe was called general sales manager of the Consolidated Cement.

Q. Did you have a conversation with Mr. Hjerpe with regard to the award to the Marquette Company of a large contract on state highway business in 1933?

A. Yes.

Q. Will you state what you and he had to say in that connection?

A. Well, he said that the Marquette Company did not reduce their commercial prices in accordance with their bid prices to the State of Illinois in 1933.

Q. Anything else about the conversation that you can recall?

(Thereupon the witness referred to a memorandum.)

Mr. Zimmerman: Now, is the witness referring to notes now or not?

The Witness: I am going to. I haven't been.

Mr. Zimmerman: You mean, that you don't recall anything else without referring to notes?

The Witness: I am proposing to refer to my

12834 notes to refresh and make more certain my remembrance of the conversation.

Mr. Zimmerman: Well, I object to his referring to notes unless he is referring to notes made contemporaneously with the conversation.

Trial Examiner Norwood: Well, these are the same notes we have had under discussion this morning.

Mr. Zimmerman: These are some other notes now.

By Trial Examiner Norwood:

Q. Were these notes that were made in the same way as the others?

A. Exactly.

Mr. Zimmerman: Now, I think we have a right to have produced the notes that he made of the entire conversation contemporaneously therewith. I object to his making excerpts from those.

Trial Examiner Norwood: He will only have to produce the notes that he is using to refresh his memory; those and those only.

Mr. Zimmerman: Well, I think we are entitled to have the notes of the entire conversation, because we would have a right to bring out the entire conversation.

Trial Examiner Norwood: You can ask him for the entire conversation, if he has any such. Objection
12835 overruled.

I will ask you now to refresh your memory and then put your notes away and then make your answer.

(Thereupon the witness did as requested.)

A. Well, shortly after they made the bids for Illinois, Mr. Hjerpe stated that the Marquette Company sent out quotations to Dealers raising their prices 25 cents a barrel.

Mr. Zimmerman: If Your Honor please, may I see the notes to which he referred?

Trial Examiner Norwood: Yes.

(The notes referred to were handed to counsel.)

By Mr. Zimmerman:

Q. This is all, is it? You have handed me all the notes to which you made reference, is that it?

A. All the notes to which I have made reference—

Q. In the conversation with Hjerpe?

A. —in the conversation with Hjerpe, yes.

By Mr. Wooden:

Q. Have you finished your statement, Mr. Royal?

A. Yes.

Q. Can you say whether or not you had any conversation with Mr. Hjerpe as to whether the 25 cent increase was followed by others?

A. He said it was followed by others.

Q. How about his company?

12836 A. Well, now, I can't recall whether he said his company followed it, but he told me, in fact, that the other cement companies followed the raise of the Marquette Company.

Q. Will you state whether or not, Mr. Royal, you ever had an interview with Mr. L. T. Sunderland of the Ash Grove Lime and Portland Cement Company?

A. I did.

Q. Will you say where and when?

A. I had an interview with him in the summer of 1931 at Omaha, and about a month later at Kansas City.

Q. Will you state whether or not you discussed with him the subject of base prices being put in—

A. I did.

Q. (Continuing) —at plants by others than the plants where they were put in?

A. Yes, I did.

Q. Will you state what you and he had to say on that occasion about that matter?

A. I asked him how basing points were set or established.

He said that many of them had grown up in the course of years from the ordinary trend of the business, but that many of them had been established by a mill upon a competing mill point without justification, and that his opinion was that this was a violation of the Clayton Act.

Q. Did you ascertain or ask him whether any 12837 of his mills had had a basing point put on them by competitors?

A. Yes, he said that the Lehigh Company had established bases on his mills.

Q. Did you have any discussion with him as to the effect of the—

Mr. Leisure: Mr. Wooden, would you mind saving a little time there, please, on these mills? Would you bring out what mills? The record doesn't show.

Mr. Wooden: Yes.

By Mr. Wooden:

Q. Can you state what mills of the Ash Grove were mentioned in that connection?

A. Superior, Nebraska and Chanute, Kansas.

Q. Now, did you have any conversation or did you have any discussion with Mr. Sunderland as to the effect of having basing point prices put on a mill by competitors located elsewhere?

A. I could only answer that question by referring to my notes again. If that is permissible, I will do it.

Q. All right.

A. (Referring to memorandum) What was the question again?

(Question read.)

Mr. Leisure: Could we have those notes marked for identification?

Trial Examiner Norwood: Where are they?

12838 Mr. Leisure: The ones he is reading from now.

Trial Examiner Norwood: Yes.

The Witness: I am not reading from them. I referred to them and I have discarded them now.

Trial Examiner Norwood: They want that marked for identification. They have a right to introduce it, if they want to. Mark them Respondents' Exhibits 68 and 69-A and B, for identification, the notes that the witness has referred to at this time.

(The memoranda of Mr. Royal referred to were marked "Respondents' Exhibits 68 and 69-A and B", for identification.)

12839 Mr. Leisure: While you are marking that, may we mark this?

Trial Examiner Norwood: Another note which was used in the testimony this morning.

(Two sides of the paper writing above referred to were thereupon marked for identification as Respondents' Exhibits 70-A and 70-B, respectively.)

Mr. Zimmerman: That would be the Hjerpe note.

Let's have the Condon notes marked while we are at it, Mr. Leisure.

Trial Examiner Norwood: All right. Where are they?

Mr. Leisure: The witness has them.

Trial Examiner Norwood: How many are there?

Mr. Leisure: The witness has the Condon notes.

Trial Examiner Norwood: Let me have them.

(Certain paper writings were handed to the Trial Examiner.)

Mr. Leisure: Couldn't we save time by having all of them marked that he has used?

Trial Examiner Norwood: Just the ones that you referred to and have given in your testimony here today.

The Witness: I am trying to find the Condon notes.

Trial Examiner Norwood: Are these all of them?

Off the record.

12840 (A discussion ensued off the record.)

Trial Examiner Norwood: For the record.

Six other memoranda used by the witness in his testimony may be marked as Respondents' Exhibits 71 to 76, inclusive.

(The paper writings above referred to were thereupon marked for identification as Respondents' Exhibits 71,

72, 73, 74, both side of a paper writing as Respondents' Exhibits, 75-A and 75-B, respectively, and both sides of a paper writing as Respondents' Exhibits 76-A and 76-B, respectively.)

Trial Examiner Norwood: Go ahead.

Mr. Wooden: Number this one.

(The purported letter above referred to was thereupon marked for identification as Commission's Exhibit 2259.)

Mr. Wooden: Your Honor, I wish to offer at this time the paper marked as Commission's Exhibit 2259, for identification, subject to check, it being an original letter from the auditor of the Ideal Cement Company addressed to the Chief Examiner of the Federal Trade Commission, dated March 5, 1932.

Trial Examiner Norwood: Any objection?

Mr. Leisure: No objection.

By Mr. Wooden:

12841 Q. Mr. Royal, when you were on—

Trial Examiner Norwood: Wait a minute. Received as marked.

(COM. EX. 2258 was offered and received in evidence.)

(COM. EX. 2259 was offered and received in evidence.)

Q. Mr. Royal, when you appeared as a witness in this proceeding last June, I believe you testified concerning interviews that you had with officials of certain companies in California.

A. Yes.

Q. Was one of them the Southwestern Portland Cement Company?

A. Yes.

Q. Whom did you interview at that company's offices, if that is where the interview was held?

A. I interviewed Mr. Merrill, I think it was.

12842 Q. Any one else?

A. Mr. Partridge.

Q. Will you state whether you discussed with Mr. Partridge the subject of his company's use of any other company's price lists?

A. Yes. Mr. Partridge—I did discuss that with Mr. Partridge.

Q. What did Mr. Partridge tell you?

A. He said in quoting prices they made use of a price list put out by the Riverside Cement Company.

Q. Is that the entire conversation on the subject? If you have any notes that you need to refresh your recollection from, you may use them.

Mr. Leisure: May we have the notes to which the witness is referring marked, your Honor?

Trial Examiner Norwood: Yes.

The Witness: Well, then, I had better hold them until I finish with them.

Trial Examiner Norwood: Is that already marked?

The Witness: No, it has not been marked.

Mr. Norwood: May he answer the question first before he has them marked?

Trial Examiner Norwood: Go ahead. Answer the question.

A. Mr. Partridge said that the prices were deter-
12843 mined entirely by the price list and the zone map of the Riverside Company.

Mr. Leisure: May we have them marked now, please?

Mr. Wooden: Did he finish his answer?

Trial Examiner Norwood: I believe so.

(A paper writing was handed to the Trial Examiner by the witness.)

Trial Examiner Norwood: Mark this as Respondents' Exhibit, for identification, No. 77.

(The paper writing, both sides were thereupon marked for identification as Respondents' Exhibits 77-A and 77-B, respectively.)

Mr. Leisure: May we have the other one marked also?

The Witness: It wasn't used.

Trial Examiner Norwood: He hasn't used any other yet.

Mr. Brick: He used both.

Trial Examiner Norwood: Did you use two?

The Witness: I haven't used it.

Mr. Leisure: May we have the notes that the witness is now reading from marked?

Trial Examiner Norwood: He hasn't used it.

Mr. Leisure: Well, he is using it now.

Trial Examiner Norwood: There is no question
12844 pending, is there?

Mr. Leisure: No, but he is reading from certain notes, and I would like to have them marked.

Trial Examiner Norwood: Yes, but he might be reading a newspaper. Wait until he uses it and has given his testimony.

By Mr. Wooden:

Q. Mr. Royal, you spoke of your interview with Mr. Merrill. Did you have any discussion with Mr. Merrill on the subject of uniformity of prices in the state bids and county bids?

A. Yes, I did.

Q. Will you state what Mr. Merrill told you in that connection?

A. Mr. Merrill said there was a greater uniformity in state bids than in bids to the counties for the reason that as a rule the shipments to various destinations on the state bids were shipped by rail, and the rates were definite and easy of ascertainment, while with trucks the rates fluctuated occasionally and they varied between different truck companies and between the same—between different truck companies as to the same towns.

Q. Now, did you have an interview on that trip with officials of the Riverside Company?

A. Yes.

Q. Whom did you see there?

12845 A. Mr. Dukay.

Q. Do you have notes that will enable you to refresh your recollection on that?

12846 Q. Mr. Royal, have you refreshed your recollection from notes as to whom you saw at the Riverside Cement Company?

A. I have. It was Mr. Beckett, G. A. Beckett.

12847 Q. Who is he?

A. I believe he is the vice president—general manager.

Q. And when was it you saw him?

A. That was in January of 1932.

Mr. Zimmerman: How about having those notes marked?

Mr. Wooden: If you need any help from the notes that you have, why, refer to them freely in answering my questions.

Mr. Zimmerman: Oh, I think the witness ought to have his recollection, if any, tested before he refers to notes.

Trial Examiner Norwood: I think so. You tell us what you know about it first.

By Mr. Wooden:

Q. Well, I will ask you the question: Just how sure are you of that time and date?

A. It might have been in February, early in February.

Mr. Zimmerman: Now, the witness said he has referred to notes with reference to this matter. May those notes now be marked?

Mr. Wooden: He hasn't said that.

Trial Examiner Norwood: He said he referred to them, but did you refer to them on the stand here?

The Witness: No, I haven't.

12848 Mr. Zimmerman: I don't think it is material whether it was on the stand, if he refers to them.

Trial Examiner Norwood: I think it is.

The Witness: I said I had refreshed my recollection. I didn't say I had referred to any notes.

Mr. Zimmerman: The question was whether he had refreshed his recollection by looking at notes.

Mr. Wooden: Not on that point.

Mr. Zimmerman: And he said he had.

Mr. Wooden: I said he might do it, if he wanted to.

Trial Examiner Norwood: The question was, could you refresh your recollection?

Mr. Zimmerman: The question was, have you refreshed your recollection from looking at notes.

Mr. Wooden: Not on the date.

Mr. Zimmerman: I ask that those notes be marked for identification.

Mr. Wooden: Just be patient and you will have them marked, Mr. Zimmerman.

Trial Examiner Norwood: Yes, go ahead and answer the question.

By Mr. Wooden:

Q. Did you have any discussion with Mr. Beckett with reference to any zones or zone maps?

A. Yes, I did.

12849 Q. What did he say?

A. He said they issued a zone map that showed the territory within greater Los Angeles and surrounding suburbs, and that this zone map was used in connection with their price lists.

He said that they usually included the zone map with price lists in mailing the price lists to customers, and they were also mailed to competitors.

Q. Did you have any conversation with Mr. Beckett on that occasion with reference to what company, if any, took the lead in getting out price lists?

A. He said the other cement companies in Los Angeles followed the Riverside Company's prices.

Q. Did you make any inquiry of Mr. Beckett as to the reason for having these zones on the zone map that you referred to?

A. If I may refer to my notes—

(Thereupon the witness referred to certain notes.)

By Trial Examiner Norwood:

Q. Which ones are you referring to now?

A. The Beckett notes.

Trial Examiner Norwood: Have them marked before you refer to that there. Give it to the reporter and mark them with the next Respondents' number.

12850 (The notes of Mr. Royal referred to were marked "Respondents' Exhibits 78, 79 and 80", for identification.)

The Witness: What was the question there?

(Question read.)

Mr. Zimmerman: May the record show the notes to which he referred, how they are marked?

Trial Examiner Norwood: Yes, refer to the numbers when you refer to them.

A. He said they were used by all the competing companies in southern California, because 70 per cent of the southern California business was sold within the metropolitan district of Los Angeles.

Mr. Wooden: Will you read my question again, please?

Trial Examiner Norwood: Read the question.

(Question read.)

By Mr. Wooden:

Q. I don't believe your answer was quite responsive, Mr. Royal. That is why I had the question repeated.

A. Well, the companies were, the competing companies were all thoroughly familiar with their prices, and rather, with the fact that they were issuing the price lists and the zone map in connection.

Q. My question is, did you ask him the reasons for having these zones?

12851 A. I would have to refer to these notes for that.

Trial Examiner Norwood: Go ahead.

Mr. Zimmerman: What notes are they that he refers to, please? What is the exhibit number?

The Witness: 78, 79, 80.

A. He did say that the zone maps were adopted to stabilize the market.

By Mr. Wooden:

Q. Did you make any inquiry of Mr. Beckett as to the use of a basing point in southern California?

A. I did. He said there was none used.

Q. He said what?

A. There was none used.

Q. Now, did you have an interview with any officials of the California Portland Cement Company, and if so, who, when and where?

A. I interviewed Mr. Duque, D-u-q-u-e, late in January or early in February, 1932, at Los Angeles.

Q. Did ou ask Mr. Duque any questions regarding the price lists used by the California—by his company?

A. I did.

Q. Will you state what he told you?

A. He said they did not—his company did not issue price lists but followed the price lists gotten out by the Riverside Company.

12852 Mr. Wooden: I have nothing further from Mr. Royal.

Trial Examiner Norwood: Examine him.

Mr. Leisure: May we have the Duque notes marked, please, your Honor?

Trial Examiner Norwood. They are the notes that you used that have not been marked?

(A paper writing was handed to the Trial Examiner.)

Trial Examiner Norwood: Mark it Respondents' Exhibit 81-A and B.

(Both sides of the paper writing above referred to were thereupon marked for identification as Respondents' Exhibits 81-A and 81-B, respectively.)

Mr. Leisure: The other two, were they used by you, Mr. Royal?

The Witness: I beg your pardon?

Mr. Leisure: Did you use the other two in making replies about Mr. Duque?

The Witness: These (indicating)?

Mr. Leisure: No, the other two, the two you just put in your pocket. Did you use those?

The Witness: These I have in my pocket?

Mr. Leisure: Did you use those. If you did, I would like to have them marked.

Trial Examiner Norwood: Did you use them in
12853 your testimony this morning?

The Witness: Let me see if I have. I think probably I did refer to this.

Mr. Leisure: Just mark it, please.

Trial Examiner Norwood: Mark it 82, Respondents.

Cross Examination by Mr. Leisure.

Q. How long did you say you had been with the Federal Trade Commission?

A. About nine years.

Q. Now, I think you said that you conducted three separate investigations at different times in which you
12854 called on different cement manufacturers?

A. Yes, sir.

Q. Is that correct?

A. That is true.

Q. And one of them was with reference to the Senate resolution in 1931? That was one of the investigations?

A. Senate resolution of approximately that year. I am not exactly sure that it bore the date of '31.

Q. And the other was with reference to the Illinois and Indiana, Iowa highway lettings?

A. That is true.

Q. That was approximately in 1933?

A. 1933.

Q. Is that correct?

A. That is true.

Q. Then there was a subsequent investigation with respect to these proceedings; is that true?

A. Yes.

Q. And the date approximately that you conducted that?

A. That was in the fall of 1936.

12860 Q. When you made the notes you intended to set out a correct statement of what took place between you and the witnesses interviewed, isn't that true?

A. Yes.

Q. Yes. Have you told us here everything that is contained in your notes with respect to the interviews that you have described?

A. Only on the material features.

Q. Well, what do you mean by "material features"?

12863 A. I have tried to only answer questions that were put to me.

By Mr. Leisure:

Q. In other words, the rest of the conversation that you were not asked about, which is contained in your notes, you have not told us about so far?

A. No.

Q. Now, as to the material features, when you went there, you went there under the employ of the Federal Trade Commission, didn't you?

A. Yes.

Q. And you were asking specific questions that you wanted to get answers to?

A. Yes.

Q. You were asking specific questions to which you wanted to get answers, is that correct?

A. That is true.

Q. When you wrote up the notes as covering what you believed, as you have told us, as being an accurate statement of what was said, did you attempt to cover everything that was said or only what you considered to be material?

A. Well, I intended to cover only material mat-

12864 ters, but, of course, some matters were more material than others.

12888 EUGENE MORRIS was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. MacIntyre.

Q. Mr. Morris, did your subpoena call for the production of any paper or papers here today, documents?

A. A letter, yes, sir.

Q. Have you produced the document?

A. Yes, sir, it is available.

12889 Mr. MacIntyre: I will ask your Honor to have it marked, please, for identification.

Trial Examiner Norwood: Mark it as 2260.

(The purported letter above referred to was thereupon marked for identification as Commission's Exhibit 2260.)

I am Chairman of the Central Freight Association. My office is located at 2048 Transportation Building at the corner of Harrison and Dearborn Street southwest, Chicago, Illinois. I have held my position about twenty years. The nature of my duties is that I am executive of the organization. It is an organization through which the carriers, the railroads operating in Central Freight Association territory interchange propositions or correspondence regarding changes in rates, rules or regulations applicable on railroad freight traffic. The Nickel Plate road,
12890 the Wabash Railway, Pere Marquette, New York Central Lines, the C & O Lines, the B & O and the Pennsylvania are members of our association. The Lehigh Valley Railway is not a member. That should be qualified as to Pennsylvania, C & O and New York Central to the extent that they are members so far as concerns their rails, New York Central west of Buffalo, Pennsylvania west of Pittsburgh, C & O west or north of Charleston, West Virginia. In other words their rails east of Buffalo
12891 and Pittsburgh and Charleston are not in our organization.

The witness identified Com. Ex. 2260 as a communication, dated May 4, 1932, from Albert P. Myer, vice president, Davis Coke & Iron Company, to Eugene Morris, Chairman of the Central Freight Association regarding short haul cement freights in C. F. A. territory.

"Examiner Norwood: Was he vice-president of the Green Bag Cement Company of Pennsylvania?

Mr. MacIntyre: That is an affiliated concern, your Honor, the same general management and ownership." There are marks on this letter in the witness's handwriting. "We had file clerk named John Temel, and his initials are J. T., and 'Mr. M.' are indicative of the advices to him that he should give the file on this subject to me with the letter attached." That is his handwriting appearing
12892 in the upper righthand corner. The file number is not the witness's handwriting. The letters "J. T." and "Mr. M." are in his handwriting. The purple receipt stamp is the stamp indicating the time it was received in the office and the blue receipt stamp indicates the time that the file department got it. His office is the Central Freight Association, at Room 2048, Transportation Building.

12893 Mr. MacIntyre: All right. Your Honor, we will offer this in evidence at this time and call attention in that connection to Commission's Exhibit 1043-B, of which the Commission has asked us to make some effort to secure the original, 1043-B appearing as a typewritten copy of a letter.

Trial Examiner Norwood: Are there any objections?

Mr. MacIntyre: In that connection, I would also like to call your Honor's attention to a document which has been marked, for identification, as Commission's Exhibit 1607, and in that connection I also call your Honor's attention to a document which has been marked, for identification, as Commission's Exhibit 1613.

Trial Examiner Norwood: You mean they haven't been offered in evidence?

Mr. MacIntyre: They have not. I am just noting it on the record. I will show you the 1607 at this time so that you may consider it in connection with the relevancy and materiality of this document.

Mr. Leisure: Is that in evidence, Mr. MacIntyre?

12894 Mr. MacIntyre: No, it is not. I am merely showing it to the Examiner for his information at this time in this connection.

Mr. McFadden: You can't very well support one by another if they are both out.

Mr. MacIntyre: As produced—1607 was produced by the Medusa Cement Company under subpoena.

Trial Examiner Norwood: And what else? What is the other one?

Mr. MacIntyre: 1613.

Trial Examiner Norwood: All right.

Mr. MacIntyre: 1613 being a file copy, a carbon copy of a letter from the Medusa Portland Cement Company from their files.

12895 By Mr. Leisure:

Q. I would ask one question: Did you reply to the letter, do you know, Mr. Morris?

Trial Examiner Norwood: Did you reply to this letter?

A. No, sir, I don't believe we sent any answer to it.

The witness identified Com. Ex. 1619 as a letter of the "speaker" on April 19th, written to Mr. Cole, acknowledging receipt of his letters of April 12th and 15th re-

12897 garding the question of shipping—. That is the witness's signature on the bottom of that letter. The

file number, A-85-51-1199, appearing in the upper right-hand corner of this letter, is a file number placed on there
in his office; the same file number appears in the
12898 upper righthand corner of Com. Ex. 2260. The
file number was placed on 2260 in his office under his direction on May 9, 1932, which is the date the file department received the letter. He received Com. Ex. 2260 in due course of mail; Com. Ex. 1608 as a letter dated May 3rd, by the "speaker" to G. W. Cole, General Traffic
Manager of the Medusa Portland Cement Company,
12899 bearing a file number placed on there in his office.
The file number which is A-85-51-1199, is the same file number appearing on Com. Ex. 2260.

Q. Now, do you wish to change your testimony that you haven't had any correspondence with Mr. G. W. Cole, traffic manager of the Medusa Portland Cement Company, on the subject of the letter—on the subject which is discussed in the letter, 2260?

A. I would say yes, sir, to the extent of the two
12900 letters referred to.

By Mr. MacIntyre:

Q. Well, again, calling your attention to the document marked, for identification, as Commission's Exhibit 1608, does that refresh your memory and recollection on the point of whether you had had any further correspondence with Mr. Cole on the subject?

A. I have no memory of any further correspondence with Mr. Cole on the subject except the two letters referred to.

Q. I believe he states there, "this will acknowledge your letter of April 30th—"

Mr. Leisure: Is that in evidence?

Trial Examiner Norwood: Wait a minute.

Mr. MacIntyre: This has been offered, but 1608 has not been offered as yet.

Mr. Leisure: Then I object to counsel reading from documents not in evidence.

Mr. MacIntyre: I am asking him to refresh his memory from that letter as of that time.

Trial Examiner Norwood: Yes, he may ask him to refresh his memory.

By Mr. MacIntyre:

Q. After looking at 1608, now is your memory and recollection refreshed as to whether or not you had, in turn,

received correspondence from Mr. Cole on that subject?

12901 Q. On the subject of which file number A-85-51—

Mr. Leisure: I still think he is reading from a document not in evidence.

Trial Examiner Norwood: I think so. Did you move to strike that last?

Mr. Leisure: Yes, I do.

Trial Examiner Norwood: Motion allowed.

Mr. MacIntyre: Now, what is stricken, if I may ask?

Trial Examiner Norwood: He can refresh his memory from that document marked for identification, but then he must, without reference to the paper at all, if it does refresh his recollection, he must testify independently of the paper.

Mr. MacIntyre: That is what I would like for him to do.

Mr. Zimmerman: If the Examiner please, the witness has stated that the document shows such and such. He doesn't state that he has any memory or any firsthand knowledge of any of this.

Trial Examiner Norwood: He is now asking him that. Go ahead. Let him answer.

12902 Q. I am asking the witness to look at documents to which I have made reference, that is, 1608, 1619 and 2260, all being documents marked for identification as Commission's Exhibits, and to refresh his memory and recollection as to whether or not he has had with Mr. G. W. Cole, traffic manager of the Medusa Portland Cement Company, correspondence on this subject which is discussed in the document marked for identification as Commission's Exhibit 2260.

Mr. Zimmerman: Now, I want to object to the question insofar as the witness may make any reply thereto, except that which he knows of his own knowledge.

Now, it will be observed that the question goes to whether he, individually, had this correspondence, not what he found in the files or that somebody else may have done.

By Mr. MacIntyre:

Q. Well, I will put it that way, as to whether he, individually, had correspondence with that man on this subject—

Mr. Zimmerman: That is all right.

By Mr. MacIntyre:

Q. (continuing) —as discussed in 2260?

Trial Examiner Norwood: Now, let the witness refer to that and then answer the question.

A. I have no knowledge that we wrote this gentleman, Mr. Cole, any letters except the two referred to formerly.

12903 Trial Examiner Norwood: That answers it.

By Mr. MacIntyre:

Q. That what?

A. That we wrote Mr. Cole, excepting the two letters formerly referred to.

Mr. Zimmerman: When the witness says "we", does he mean himself?

The Witness: Yes, sir.

Mr. Zimmerman: That is all I wanted to know.

Trial Examiner Norwood: Go ahead.

By Mr. MacIntyre:

Q. The last answer of the witness wasn't exactly responsive to the question. I asked him whether or not after examination of the documents to which I had made reference, that refreshed his memory and recollection as to whether he had correspondence with Mr. Cole. I would like for him to answer that question definitely and clearly, and as concisely as he possibly can.

A. Those two letters referred to indicate that I had correspondence with Mr. Cole, and to the extent of those two letters only do I remember that we had any correspondence with him.

Q. Now, Mr. Morris, I call your attention to a document marked, for identification, as Commission's Exhibit 1574-A, and ask you to state whether or not you

12904 had additional correspondence with Mr. Cole on that subject?

A. We apparently did, because the letter we wrote him on January 30th refers to the subject also. Now, it refers to the subject of cement rates. It may not be the same subject, but it refers to the subject of cement rates.

Q. What about the file number appearing thereon?

A. The same file number.

Q. Is it your practice to file documents on the same

subject in the same file or on several subjects in the same file?

A. We undertake to keep all letters under one file relating to the subject, the commodity subject.

Q. Is that your signature appearing on the document marked, for identification, 1574-A?

A. Yes, sir.

12905 I. D. ROYAL resumed the stand and testified further as follows:

12945 *Redirect Examination by Mr. Wooden.*

12946 Q. Mr. Royal, referring to Commission's Exhibits 2230-A and B, and 2231, did you ascertain from Mr. Condon, who I understand furnished you those papers, whether those details were made up for the bidding before the bidding or after the bidding?

A. Why, I think they were made up after the bidding.

Q. What was the answer?

A. I think they were made up after the bidding.

Q. Were they papers in the files or were they prepared for you especially?

A. I think they were in their files and prepared for me approximately at the date of the interview from material in their files.

Q. Well, do you know or did you ascertain when the papers that were in their files had ben made up?

A. I understood that they were made up after the bidding.

Q. You are not sure about that?

A. That is my best recollection.

Mr. Wooden: All right.

Q. I am handing you four torn slips of paper. Do those comprise the entire paper which you were asked about tearing up and discarding under the radiator during intermission?

A. They certainly do represent all of it.

Q. Will you piece them together and read every

12947 word that appears on that paper?

Mr. Leisure: Your Honor, I don't know what it is. I don't know whether it is necessary to encumber the record with it.

Mr. Wooden: I wouldn't have thought so either.

Trial Examiner Norwood: I think it can go in considering everything that was said about it.

A. The wording is "I int."—the first word is "I" and then i-n-t—"S. W. Storey and"—the character "and"—"and A. E. Herpe", I guess I had it spelled H-e-r-p-e—"in August, 1931." And then "Storey was V. P. later receiver." And then a couple of lines below, or, rather, a short space below: "In re exhibits."

By Mr. Wooden:

Q. Is that every word that appears on those torn pieces?

A. Every word.

12955 Chicago, Illinois,
January 9, 1939.

12957 B. H. RADER, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am vice president and western sales manager of the Lehigh Portland Cement Company. I have been
12958 connected with the company since 1915 and have been a vice president and western sales manager for something like 10 or 12 years. The territory over which I function as western sales manager is the western territory usually west of Ohio.

Q. Will you state what mills of the Lehigh Company are in the territory over which you exercise sales jurisdiction?

A. Mitchell, Indiana; Oglesby, Illinois; Mason City, Iowa; Iola, Kansas; Metaline Falls, Washington.

Q. What portion of the total production of the Lehigh Company is represented by the mills over which you exercise sales managership?

A. I don't believe I know the exact proportion. We do in the ordinary year three or four million barrels of business in the west.

Q. Can't you give us some approximation of how that compares with the total business of the company?

A. Well, for the last year or two, it is approximately a third. I would say a little less than a third.

Q. Are you the only vice president of the company?

A. No, sir; we have several vice presidents.

12959 Q. How many?

A. I couldn't answer that without checking it up.

Q. Is one of those vice presidents Mr. John Bowen?

A. Yes, sir.

Q. Is another Mr. Bert Swett?

A. Mr. Swett, Mr. Baer. I am not sure. I believe that is all.

Q. I beg your pardon?

A. I believe that is all. I am not sure.

Q. Do they have certain territories allotted to them for supervision?

A. Yes.

Q. Will you state what the territories are that they have?

A. Well, they have the balance of the territory that I have not described to you.

Q. Well, I assumed so, but as to each one, which territory do they have?

A. Well, Mr. Swett is in charge of sales in the East. He has the rest of the territory.

Q. And Mr. Bowen? What is his territory?

A. Well, he is, I think,—he was assistant to Mr. Swett.

Q. Do I understand, then, that the entire sales territory of the company is headed up under you in the west and Mr. Swett in the east; is that it?

A. That is the set-up of the organization; yes, sir.

12960 Q. Will you outline briefly the territory into which the respective mills of the Lehigh Company make shipments?

A. Well, the Mitchell mill slips into Indiana, a little of Ohio, Illinois, some into Tennessee.

Oglesby ships into Wisconsin and Illinois.

Mason City ships into Iowa, Minnesota and the Dakotas.

Iola, Kansas, ships into Kansas, Arkansas, Missouri and Nebraska, and Oklahoma, and a little of Texas.

The Spokane or Metaline Falls mill ships into the state of Washington, practically all of it; a little bit into Montana.

The eastern mills, I can't give you that, I don't know the places they ship.

Q. Doesn't the Metaline Falls mill get into Wyoming sometimes?

A. No.

Q. Hasn't it—

A. No.

Q. —at some times?

A. No.

Q. Have you occupied some official position at any time with The Cement Institute?

A. Yes.

Q. Will you state what and when?

12961 A. I think I was acting president for a short time, but I can't tell you the time. I would have to get the records and look that up.

Q. Can you approximate it?

A. Oh, I think it was in 1933 or '34, I think.

Q. During the code period?

A. It may have been '35, just after the code period.

Q. Have you held any other position with The Cement Institute?

A. As a trustee.

Q. Are you a trustee at the present time?

A. Yes, sir.

Q. And for what district?

A. District 5.

Q. What are the boundaries of that district?

A. It would be Wisconsin, Indiana, Illinois and Kentucky.

Q. Have you been at any time a manager or regional manager for The Cement Institute?

A. I think I was probably several years ago.

Q. When was that, about?

A. I couldn't answer that; I couldn't tell you.

Q. What position did you hold, if any, with the Code Authority at the time, under the N.R.A. Code?

A. I was chairman of the Code Authority.

Q. During the entire period of the code?

12962 A. No, the first year of the code.

Q. And who succeeded you?

A. George Reiter.

Q. To what extent has the Lehigh Company in your sales territory disposed of its product through the dealer trade?

A. To what extent?

Q. Yes.

A. You mean what percentage?

Q. Something of that sort, by comparison with other classes of trade.

A. Well, the largest portion of our business in my territory has been marketed through the dealers. I couldn't give you the percentage, but the larger portion.

Q. Do you make your sales to the dealer outright, so that the dealer becomes the owner of the cement?

A. Yes, we sell the dealer outright, of course.

Q. Can you say whether or not your company has had any greater dependence upon the dealer trade as an outlet than other cement manufacturers?

A. I only know what our company does. We think we have a pretty good dealer trade.

Q. I meant as to the degree you were dependent on the dealer trade. In other words, did you make any more of a specialty in pushing the dealer trade than other companies?

A. Well, we made a specialty of pushing the
12963 dealer trade as hard as we could; have been doing that for many years.

Q. You can't say whether there has been any difference between your company's policy in that respect and that of other cement manufacturers?

A. I found most all of them pushing it pretty hard.

Q. You see no difference then between yourself, your company and others in that respect?

A. No particular difference.

Q. It has been testified here, Mr. Rader, that you attended a certain meeting in Chicago in March, 1935, at which representatives of dealers or dealer associations were present. Do you recall having attended any such meeting?

A. I recall there was a meeting or two. I don't recall very much about it and I don't know the dates.

Q. Will you tell us what you recall of any such meetings?

A. Well, along in February, after we sent out our selling policy to the dealers there were some meetings where dealers asked me to meet them. They were criticizing our selling policy.

Q. In what respect?

A. Well, in several respects; in the quantity of cement that we were selling direct, the way we were selling it. We had quite some arguments about it.

Q. Were they criticizing your selling policy on the ground that you were selling W.P.A. business direct?

12964 A. No, I wouldn't—I couldn't say just what business. You understand the dealer naturally has always wanted to handle all of our cement. They don't want us to sell anybody else, and we tried to strike a medium between government—

Q. Well, what classes of trade were you selling direct that dealers didn't want you to sell direct?

A. At that time?

Q. Yes.

A. I don't recall for sure just what the classes were at that time.

12965 Q. You don't recall whether WPA business was one of those classes?

A. Not as WPA. They talked about emergency relief work more than anything else.

Mr. Wooden: Mark these, please.

(The paper writings referred to were marked "Commission's Exhibits 2262-A and B", for identification.)

By Mr. Wooden:

Q. Mr. Rader, I am showing you papers marked, for identification, as Commission's Exhibits 2262-A and B. Will you tell us what they are?

A. The first one, 2262-A, is corrections on our selling policy of February 20th.

Q. Was that sent out to your dealer trade?

A. Yes.

Q. What is 2262-B?

A. It has no date on it.

Q. Is it referred to in 2262-A?

Mr. Leisure: The witness is being asked to compare some paper with another. I would like to see what it is.

Trial Examiner Norwood: Let him answer the question.

Mr. Leisure: Well, if he knows—

12966 A. I don't see that it is mentioned in 2262-A.

Trial Examiner Norwood: Well, do you—

By Mr. Wooden:

Q. What is the revised statement of policy attached that is referred to in 2262-A? I will ask you if that isn't 2262-B.

A. I don't know.

Mr. Leisure: Well, I would like to see the paper. If the witness has not seen the paper before and does not know what it is, I object to the question. I would like to know what it is.

Mr. Wooden: He said what Commission's Exhibit 2262-A is. He said it is a correction of the sales policy sent out by the Lehigh Company to its trade.

Trial Examiner Norwood: Yes.

Mr. Wooden: Dealer trade.

The Witness: But I can't tell you whether this attachment is that or not. It has no date on it.

Trial Examiner Norwood: Well, that is the 12967 answer.

Mr. Wooden: Well, I will offer at this time Commission's Exhibits 2262-A and B, for identification, and subject to such check as may be wanted or desired as to 2262-B. I take it, 2262-A has been completely identified by the witness. "B" is over the name of the Lehigh Company.

Examination on Voir Dire by Mr. Leisure.

Q. Mr. Rader, I notice that Exhibit 2262-A has been clipped. 2262-A is dated April 6th, 1935.

A. Yes.

Q. And has clipped to it by a brad—

A. Yes.

Q. —2262-B, which is undated. Did you clip 12968 those two documents together?

A. Not that I know of.

Q. Do you know who did clip them together?

A. No, I don't.

Q. Is Commission's Exhibit 2262-A to the best of your knowledge and belief a document which was issued by your office?

A. Issued by the Lehigh Company, yes.

Trial Examiner Norwood: Any objections?

Mr. Leisure: I have no objection.

(COM. EX. 2262-A and B was offered and received in evidence.)

Direct Examination (Resumed) by Mr. Wooden.

Q. Referring to Commission's Exhibit 2262-A, your company states that "The revised statement of policy somewhat enlarges the field of business which we sell only to dealers."

Will you state what that enlargement consisted of?

A. I would like to look at this a minute and see if I can connect it with just what it is.

(The witness examines the exhibits referred to.)

12969 A. No, I can't state that from this. This don't seem to be the original policy of February 20th, and I don't remember just what the addition is.

By Mr. Wooden:

Q. Well, you can't state from general knowledge and memory what the enlargement consisted of?

A. Why, I believe there is—I believe I recognize one of these paragraphs.

Q. In 2262-B?

A. In 2262-B, yes. "Large manufacturers of concrete and cement products." If I remember correctly, that word "large" was added to that from the original policy.

Q. In other words, the large manufacturers might be sold direct?

A. Yes.

Q. And who was to determine which were large?

A. We were.

Q. Did the dealers endeavor to help you any in that determination?

A. They might have at times.

Q. They expressed their views as to what manufacturers were large enough to come within that definition?

12970 A. They never failed to express their views in anything they are interested in.

Q. This enlargement of their policy between February and April, that followed some representations made by the dealers at this meeting you have talked about; did it not?

A. It probably did.

Q. Do you remember who else among the manufacturers or representing manufacturers were in attendance at that meeting?

A. No, I don't remember specifically. First, those dealers asked me to meet them. They were criticising my

policy, or our sales policy, I mean, and arguing with me as to what I should and should not sell direct.

Q. Were they criticising Lehigh's policy any more than they were the policy of other manufacturers?

A. They were only criticising Lehigh's policy to me.

Q. Do you recall other manufacturers of cement being represented at the meeting that you attended at which dealers were represented?

A. There was more than one of those meetings, and they are so long ago, and so confused that I haven't much recollection of just who was there. I think at one time I tried to get them to invite some of the other manufacturers.

12971 Q. Did they invite them?

A. I rather imagine they did. I was trying to get some responsibility off of myself.

Q. Did you suggest any of the manufacturers to be invited?

A. I don't think so. I just merely probably made the statement, "Why do you pick on me all the time? There are other people in this business."

Q. Did you get an answer to that, as to why they picked on you?

A. I don't remember.

Q. Did they express to you that they were coming to you because you were the head of the Code Authority?

A. No, they did not.

Q. Or connected with the Code Authority?

A. No, I don't recall that they did.

Q. Can you specify any other particular in which your announcement of April 6th, 1935, Exhibit 2262-A, somewhat enlarged the field of business?

A. I don't think I could without taking that and comparing it with the one of the 20th. I don't recall just what they are.

Mr. Wooden: Will you give that the next number, please.

(The document referred to was marked "Commission's Exhibit 2263-A and B" for identification.)

12972 By Trial Examiner Norwood:

Q. That is, enlarge the field for the retail dealer, is it?

A. Well, that is supposed to be the idea.

By Mr. Wooden:

The witness identified Com. Ex. 2263-A and B: as "our" sales policy of February 20th to which he had already made reference and which was sent out to the witness's dealer trade.

Mr. Wooden: Your Honor, I will offer this at this time, subject to withdrawal in the event that it turns out there is another one already in the record. I am not sure about that.

Mr. Leisure: We are not objecting to your making the comparison.

Trial Examiner Norwood: Well, I will simply defer the ruling on that until the comparison may be made. It is marked for identification.

12973 By Mr. Wooden:

Q. Well, now, with Exhibit 2263-A and B to aid you, will you state wherein the policy of what trade was to go to the dealer—

A. Do you want me to take these and compare them?

Q. (Continuing)—was enlarged between February and April?

12975 Q. Mr. Rader, have you examined the February statement, Exhibit 2263-A and B?

A. Not very—well, I have just looked at it here, of course. I am not trying to refuse to answer these questions, but to tell you the answers, I would have to take each paragraph and go over them.

12977 By Trial Examiner Norwood:

Q. Did you carry out that policy there that is in evidence?

12978 A. Did we carry it out?

Q. Did you carry it out, yes?

A. To the best of our ability, yes.

Q. And the changes that are indicated there were carried out—

A. Practically.

Q. —in your actual practice, were they?

A. Practically.

By Mr. Wooden:

Q. Was the Lehigh Company selling some W. P. A. business direct at any time?

A. I don't know when the W. P. A. came into existence. There were so many of those, that they are rather confusing as to the various projects. We talked about it usually as emergency relief work. I remember that better than I do the alphabetical—

Q. Well, did the Lehigh Company sell Emergency Relief Work direct at any time?

A. Yes, we certainly must have.

Q. Was that one of the things that you were criticized for by the dealers?

A. I think it was discussed and, I suppose, some criticism.

Q. That is a part of the trade the dealers thought ought to be handled by them?

12979 A. Yes, they always felt they ought to have that trade.

Q. Can you say whether other manufacturers were also selling Emergency Relief Work direct before the dealers made this criticism?

A. As I came in contact with them, I think I have found that some of them did and some didn't.

Q. There was some confusion about it, would you say?

A. Quite a lot of confusion.

Q. Were the expressions of cooperation received as mentioned in Exhibit 2262-A, or, I will ask you from whom those expressions were received?

(Handing document to witness.)

A. Oh, the last paragraph, you mean, here?

Q. Yes.

A. From dealers.

Q. Can you tell us why the definition of an equipped cement dealer was inserted in this April announcement and not included in your February announcement?

A. No, I can't answer that offhand.

Q. Was that put in at the request of the dealers?

A. It might have been discussed by them and asked us to describe it.

Q. Did dealer associations provide you with lists of what they considered were equipped cement dealers?

A. No. They may have at times, but we don't use them.

12980 Q. Did they provide you with them?

A. I don't know whether they did or not.

Q. You say they may have?

A. They may have, yes, because I believe that those associations have membership lists and they may have given us copies of it at some time or other.

Q. Wasn't that discussed at the meetings with the dealers, the providing of lists of equipped dealers?

A. Not that I ever recall.

12981 Q. Mr. Rader, I am showing you papers marked 1905-A to F, inclusive. Have you seen a document like that before?

A. I have seen documents that looked similar to this.

12982 Q. All right. Where and when?

A. Well, I believe the first that I recall was during the Code. Some company took the Code interpretations that was issued by me as chairman of the Code Authority and put them in loose leaf form, or something of that kind, and it looked much like this.

Trial Examiner Norwood: Was is circulated?

The Witness: I doubt if it was circulated—I don't know. I couldn't answer that question.

By Mr. Wooden:

Q. Well, how did it come to your attention?

A. I don't know that I could answer that specifically. It was during some meeting.

Q. Did your company circulate something like that?

A. Did our company?

Q. Yes.

A. The one I am describing?

Q. The Lehigh Company.

A. Not the one I am describing, no; that is, the original.

Q. Is the one that you saw—did it carry the name of the company that did circulate it or prepare it?

A. I couldn't answer that. I don't believe it did, but I don't know.

Q. Do you recall having seen papers of that character?

A. Similar to this, yes.

12983 Q. And carrying no name?

A. Yes.

Q. You don't recall having seen any that did carry a name?

A. I don't know whether I have or not. I am not sure.

Q. I believe you said the Lehigh Company did not circulate a document of that character.

A. I believe I said the Lehigh Company did not circulate the one I described as being the first one I saw.

Q. Did it circulate anything of the form and substance that is in 1905-A to F?

A. It looked similar to the ones the Lehigh Company circulated to its own salesmen.

Q. But not to the trade?

A. We might have given some copies to some dealers if they asked for it, but not generally, no.

Q. Did the ones that you circulated among your own salesmen show the Lehigh Company as the author or circulator?

A. I doubt it, but I am not positive. I think there would be mimeographed copies and probably on cheaper paper, and our letterhead and our name would not be on.

Q. Would not be on?

A. Yes, would not be on.

Q. Which was the company that prepared the one that you referred to a few moments ago?

12984 A. I am not positive, but I have an impression that it was—that is the original one that I am speaking about.

Q. Yes.

A. I am under the impression it was prepared by the Consolidated Company.

Q. What reason have you other than just an impression for thinking that it was?

A. It occurs to me that I remember of seeing some of them showing it to me or discussing it with them.

Q. Was it some official of the Consolidated that showed it to you?

A. I can't remember that specifically.

Q. Was it Mr. Storey?

A. I don't know whether it was Mr. Storey or some of his men.

Q. What was the conversation you had with them regarding the statement?

A. As I remember it; we were—he had, as I recall the situation, it was at a Code Authority meeting where we were discussing various rulings by the Code Authority, and in referring back to some previous ruling, or something of that kind, we would be looking it up, and he seemed to have a compact form, or whoever it was of the company, of which they were all together, tabulated, easy to find

That is my first recollection of this.

12985 Q. Well, do you recall that the article or section in the Code for the Cement Industry that related to classification of trade and its division between dealers and manufacturers was suspended within a month or so after the Code was first approved?

A. Yes. Do I recall that?

Q. Yes.

A. Yes, I do.

Q. What was the time that you—what is the best approximation of the time at which you saw this paper showed to you by the Consolidated people?

A. I couldn't answer that. It was sometime during the period of the Code activities, when we were making those rulings.

Q. Calling your attention to this language that introduces the first two lines, I would like to ask whether or not the Code Authority ever sent out a document of that sort?

A. I don't think they did.

Q. Did you cause any distribution of it to be made among any—in any quarter?

A. Of that article?

Q. Of that statement.

A. Of this statement?

Q. Yes, of that sort of a statement.

12986 A. Not that I recall.

Q. Other than among your salesmen as you described a while ago?

A. Oh, I think we are getting confused. This statement may have been on the copies I recall looking at. I could not say whether it was on the copy that I am describing as the first one I ran across or not. This statement sounds much like the opening of the Article 11 in the Code.

Q. Showing you Exhibit 547-DDDD to IIII, inclusive, it bears a date of 5/28/35. 1905-A to F, inclusive, bears no date. Can you account for the lack of date in the one case?

12987 A. I can't account for the date not being on it.

By Mr. Wooden:

Q. Did you see documents like this 1905-A to F over some substantial period of time?

A. Yes, I would think so.

Q. Over how long a period of time?

A. From now?

Q. You fix the period yourself, any time. Just let us know how substantial it was.

A. Well, three or four years, I would say.

Q. Beginning sometime during the Code period?

A. Well, beginning first during the Code period.

Q. Yes. Did you have any information of other companies, other cement companies using this form of statement as to what class of trade should be sold direct and which should be sold through dealers?

A. State that again, will you?

12988 Trial Examiner Norwood: I take it, he is trying to identify the document now.

The objection is overruled. Answer the question.

The Witness: Read that question.

(The question was again read)

A. Well, I must have—no direct knowledge I would say of them using it, but I believe they have, to the best of my knowledge.

By Mr. Wooden:

Q. Well, what is the ground for your belief?

A. Well, the ground would be that most everyone that had a selling policy would probably instruct their men what they meant by their selling policy.

Q. You conceive of this paper, 1905-A to F, as

12989 being for the information and instruction of salesmen rather than the trade; is that right?

A. Yes, I would think so. Both, you can add, because I think it went to some of the trade.

Q. Now, will you identify the document marked as 1905-A to F, inclusive, as being a duplicate of the documents that you have been describing as having seen and used in your business?

12990 A. I couldn't answer that this is a duplicate. It looks similar to copies that I have seen.

By Mr. Wooden:

Q. Would you say it is the same one in substance?

A. The same in form. I couldn't say as to substance.

Trial Examiner Norwood: Well, look over it carefully and see if it is the same in substance.

Mr. Wooden: Perhaps I can short-cut the matter.

By Mr. Wooden:

Q. Do you have copies in your company files of the sort of papers that you have been referring to?

A. I expect we have.
Q. You think it is similar to that?
A. Similar.
Q. Will you produce one of them?
A. I will be glad to.

Q. Mr. Rader, I am showing you Exhibit 7-C in
12991 this proceeding—

Mr. Leisure: 7-C, Mr. Wooden?

Mr. Wooden: Yes.

By Mr. Wooden:

Q. (Continuing) —do you remember that as a letter which you wrote to the addressee shown?

(Handing document to witness.)

A. Yes.

Q. Did you receive the letter to which that is a reply and which is in evidence as Exhibit 571-R and S?

(Handing document to witness.)

A. Well, that looks like the letter that I received from Mr. Trainor.

By Mr. Wooden:

Q. To which Exhibit 7-C is your reply?
A. That looks like a copy of my reply.
Q. You have a recollection of the correspondence taking place?
A. Yes, I recall it.
Q. You recall that you received 571-R and S and replied to it as shown by 7-C?
A. Yes.

12992 Q. Is your mill—what is the base price at your mill at Mason City?
A. At the present time?
Q. Yes.
A. Well, I believe it is $1.80 with the sacks off.
Q. Stripped, in other words?
A. No, that would include the discount.
Q. $1.70 stripped?
A. I believe that is it.
Q. Is that base price at Mason City higher than the base price at other points in the general Mason City territory?
A. Higher than other points?
Q. Yes, higher than other base points.
A. It may be higher than some.

Q. Well, take Steelton, for instance. Is it higher than Steelton?

A. I believe it is lower. I can't answer these questions as to the mill prices only from memory, and I am apt to be wrong in them, because I don't carry them in my mind.

Q. Hasn't it been quite the usual thing for the base price at Mason City to be somewhat higher than at other base mills in surrounding territory?

A. It has been at times.

Q. Has it been usually 10 cents higher?

A. It has been 10 cents higher.

12993 Q. Has it been 15 cents higher sometimes?

A. Well, I would have to look at the records to check that. I couldn't recall that. It may have.

Q. Can you say why it has been higher at Mason City than at other points, other base points?

A. Well, I could more nearly compare that as to why it would be higher than our LaSalle base point.

Q. All right.

A. Because we have tried to have it higher, because it costs more money to make cement.

Q. At Mason City?

A. At Mason City than it does at LaSalle.

Q. What is the higher cost at Mason City due to?

A. Well, fuel is one thing, and I couldn't enumerate all of them. I am not close enough to the manufacature to give you that in detail.

Q. Has the Lehigh Company in the territory where you have exercised the functions of sales manager at any time put in basing point prices at mills where Lehigh itself did not have a mill?

A. Well, we have been accused of that, I believe. I don't know whether we believe we did or not. We have met prices that we found by other companies.

Q. Do you mean by that that if some mill at a point where you did not have a mill cut the price, that

12994 you have sometimes put in a base price at their point of production?

A. I believe that has been done by us tracing that back and feeling that they were using that generally, and we would use it.

Q. You wouldn't do it unless you found them using it generally?

A. I wouldn't think we did.

Q. Haven't you done it on occasions when you found the mills at such points were cutting the price on special contract jobs or large orders?

A. If we found mills cutting—quoting prices on large jobs, or small jobs, either, in sufficient quantity to warrant us to believe that we had to meet the competition, we probably did.

Q. You would put in a base price at their mills, you mean, equivalent to what they had taken on this particular business?

A. Well, if,—I would like to answer that this way: If we put a base price at their mill it was because we thought we found they were using prices that figured something back to their mill lower than we had thought they were using.

By Trial Examiner Norwood:

Q. Lower than you had been quoting for that point?

A. Yes.

12995 By Mr. Wooden:

Q. And on a large enough quantity of business so as to make it of some serious character?

A. Well, we wouldn't do it on a quotation. It would have to look serious to us.

Q. In other words, a casual quotation to a dealer at a particular place wouldn't come in that category?

A. No, I wouldn't think so.

Q. Can you name some mills at which you put in base prices under those conditions?

A. Well, I have read in the transcript of this case that we put one in in South Dakota and one at Louisville, I believe, the Kosmos plant.

Q. Well, what do you say about it? Did you?

A. Well, at South Dakota, I would say that we reduced our price at Mason City, and we had a large trade in South Dakota at one time, before that mill was built, and we probably reduced the price out there, trying to retain that trade. We felt the reduction at Mason City would reduce the eastern part of South Dakota, and we felt by reducing the western part it would give us a better chance to retain our trade through there, than to keep it up.

Q. And so you put in a base at Rapid City, is that it?

A. I believe we did.

Q. Have you kept it there?

12996 A. Now, I don't think I could say we have kept it there.

Q. Well, have you quoted there on any other basis than a Rapid City base?

A. We quote on a basis that we find in the territory. We meet the prices.

Q. You put it in there and then they had to meet your Rapid City base?

A. I don't know whether they had to. They apparently did.

By Mr. Wooden:

Q. And you continued the Rapid City base which you inaugurated and which they met, is that right?

A. I don't think I would say we continued it. We increase or reduce our Mason City base, and if they change, increase or reduce their base, we probably follow it.

Q. Haven't you taken the lead in either increasing or decreasing the Rapid City base?

A. I think probably we took the lead in decreas-

12997 ing it at the time when we put it in there. I don't think we have taken the lead of increasing, or I don't think we have taken the lead of changing it since that time.

Q. Well, has it been changed since that time?

A. Oh, I think it has.

Q. You think they have taken the lead in changing it?

A. Yes, I think they have taken the lead in changing their base.

Q. What about this Louisville or Kosmos case? Did you put in a base price at the Kosmos mill?

A. I don't have very much recollection about that. We probably found a good many quotations from the Kosmos Company that figured back to something, and we took for granted or assumed that they were using it that practically everywhere, and we used it probably.

Q. Would it make any difference whether they were using it everywhere, just so long as they were using for some important business?

A. I don't know that it would make any difference whether they were using it at every point or not, but they were using it at points enough to affect us very materially, we thought.

Q. Did you put in a base at Speeds at one time?
A. I don't recall that.
Q. Well, are there any other cases besides the
12998 Kosmos case and the case where you did put in a base at the mill of some other company and where you did not have a mill?
A. I don't recall.
Q. Did you ever put in one at Louisville, Nebraska?
A. I believe we did, similar to the Kosmos.
Q. What company was located there with a mill?
A. Ash Grove.
Q. And what were the circumstances that led to your putting in one there?
A. Similar to the circumstances I have described at Kosmos.
Q. Did you ever put one in at Cape Girardeau?
A. I don't recall it.
Q. Do you recall any other point, mill point, at which you put in base prices where your company did not have a mill?
A. I believe there was one at Ada, Oklahoma.
12999 Q. The Dewey plant is located there?
A. No, that would be the Oklahoma Portland Cement Company.
Q. What were the circumstances that led your company to do that?
A. Similar circumstances to the ones I have described.
Q. Well, in any of these cases where you say circumstances were similar, and of which you have given a general description, can you specify or particularize as to what the business was or the circumstances any more particularly than you have done?
A. Oh, no, I couldn't do that now. It is too long ago.
Q. Did you ever put in a base at Painsville, Ohio, your company?
A. I don't handle that direct.
Q. Well, do you know as a matter of company—
A. No.
Q. —knowledge?
A. No, I would have to check that up with our—you would have to find that out from someone else in our company.
Q. Have you ever withdrawn base prices that you put in at mills to other companies?

A. What do you mean by withdrawing?

Q. Well, I mean by that, have you discontinued
13000 those points as basing points in any cases?

A. Well, the ones—the ones that we are talking about putting a base in, I believe they are bases at all points yet.

Q. How about Louisville, Nebraska?

A. Yes, they have a base at that point.

Q. It has been there continuously since you have put it in?

A. I imagine it has.

Mr. Leisure: Mr. Wooden, would you mind fixing the time on some of these? The record will be better for both of us if you do.

Mr. Wooden: Yes, I would like to.

By Mr. Wooden:

Q. Suppose you tell as near as you can, Mr. Rader, when these various base prices were put in of this type that we have been talking about.

A. Well, I couldn't tell you that, Mr. Wooden. Base prices have changed in a good many years many times, and I don't carry that in my mind. I can't.

Q. Well, generally speaking, haven't they all been since the depression began, say, along in '31 or '32.

A. No, it occurs to me that some of them were before that.

Q. Well, the South Dakota plant I think was before.

A. Was before that.

Q. How about the others?

13001 A. Well, without checking the record, I would say that the Ada, Oklahoma was before that.

Q. Before '31 and '32?

A. And I am just not certain about these. I can't answer them definitely at all.

Q. Are all these points that you have named still basing points?

A. I believe they are.

Q. Kosmos?

A. I believe it is.

Q. Did you put in the basing point price at Rapid City about the time the plant there started operations?

A. I think it wasn't very lone after the plant started operating. How long, I couldn't answer.

Q. That was way back before 1930, wasn't it?
A. Oh, yes.
Q. Several years prior to that?
A. I would think it was in '25 or '26, somewhere along there.
Q Have you had objections expressed to you by the concerns at whose mill points you put in basing point prices where you didn't have a mill?
A. I don't recall whether we have or not.
Q. Didn't Mr. Sunderland ever complain to you?
A. I have heard of Mr. Sunderland complaining.
13002 I don't recall whether he ever complained to me or not.
Q. You don't recall any complaint from Kosmos?
A. No, I don't recall a complaint from Kosmos.
Q. Or from the Louisville?
A. No, I don't recall as I do from Louisville. Louisville, Kentucky, I mean.
Q. Well, I am speaking of Louisville, Nebraska.
A. Oh, well, I answered that question.
Q. That is right.
A. Before.
Q. Did you ever have any complaint made to you from the Louisville Cement Company?
A. I don't believe so.
Q. You said you understood that Mr. Sunderland had complained . What ground of complaint was given by concerns at whose points a base price is put in by an outside concern?
A. As I stated, I believe, I don't recall of them
13003 stating anything to me. I have head other people say that so and so is not well pleased with your action, or something of that kind. It is very dim in my mind about that, even.

By Mr. Wooden:

Q. Well, based on your broad experience in the cement game, do you see wherein concerns at whose mill points basing point prices are put in by outside concerns are hurt by it?
A. Well, the facts would be if you put a base in at another mill lower than they had been using, that it would reduce their price somewhat, of course. Just how much depends on that the base was.

By Mr. Wooden:

Q. It would reduce their price on all their business, wouldn't it?

Mr. Hershberger: No.

A. Not necessarily.

Mr. Wooden: Well, who is the witness?

Mr. Hershberger: That can be withdrawn, but 13004 that was—

(Laughter.)

Mr. Hershberger: I think it is obvious here that he is asking him for a discussion. It might be an argument in a brief; it might be some discussion for a magazine, but it certainly isn't anything relating to the facts in this case. He is asking him for theories.

Trial Examiner Norwood: No, no, he is asking for these effects.

Mr. Hershberger: Well, if he will hook this discussion up to some particular mill, that might be true, but he has asked him what would be the effects.

Trial Examiner Norwood: Well, he has put in bases. He ought to know what effects they would have.

Objection overruled.

Read the question.

The Witness: I answered the question.

By Mr. Wooden:

Q. Woudln't it put a ceiling above which they couldn't go on any of their business?

A. Well, yes.

Q. In other words, that would be their maximum?

A. That would be their maximum price.

Trial Examiner Norwood: Well, that would be 13005 with respect to certain localities, wouldn't it? Would that be general?

The Witness: If you had a base of any figure at your mill and stuck to that base, that would be the maximum you would obtain.

Trial Examiner Norwood: Well, I mean, the other mill where you had established the base.

The Witness: Well, if it used the base that I established, it would be the same results.

By Mr. Wooden:

Q. And if they had prior thereto been obtaining higher prices on some of their business, that would be the end

of that, wouldn't it? In other words, they couldn't get any more than the ceiling that you had put on their price at that base point?

A. Not unless they were very good salesmen.

Q. And you mean by that, I take it, that you just don't believe it would be possible for it to be done?

A. I know I haven't been able to do it.

Q. And I take it at the same time you were putting in the base at those mills where you didn't have a mill, you were making no change in the base prices at points where you did have mills; is that right?

A. No, I wouldn't say that is correct.

Q. Sometimes it occurred that way?

13006 A. It might have.

Q. Well, have you ever put in a base price at another basing point mill?

A. Well, do you mean have I ever reduced their price if it was a basing—

Q. At their basing point, yes.

A. I don't recall that we have.

Q. I take it, you agree that the way cement is sold, that the mill net realization varies to a considerable extent with an average mill net resulting, taking the business as a whole?

A. The price at the mill varies.

Q. Depending on the place to which shipped?

A. Yes.

13007 Q. Why is it that you don't put a basing point price in at another mill than where you are located to meet the lowest mill net that any other mill has taken at the particular time or just as you do where you lower the price on some important business?

A. Why don't we—

Q. Yes. In other words, why don't you lower the mill net to the lowest mill net that some other mill is

13008 obtaining rather than put in a base at the low price that they took on some important business?

A. Well, we meet the prices we find from these competitors.

Q. You meet the delivered prices?

A. We meet the delivered prices.

Q. But in the case where you put in a base at mills where you didn't have a mill, you figured it back and got

their mill realization, didn't you, before deciding whether to put in a base at their mill?

A. We must have done that. We don't know whether that was the lowest one they had or not.

Q. Well, that is the point of my question. Why don't you meet the lowest realization that they have on any of their business?

Trial Examiner Norwood: Well, that was the lowest that you had ascertained, wasn't it?

Mr. Wooden: On some important business.

The Witness: The lowest ones that we have found apparently at that time.

By Mr. Wooden:

Q. But didn't you find or aren't you aware all the time that there is a lower net realization in some instances depending on the distance to which shipped even than that base price you put in?

13009 A. Well, I think we had better go at it a different way.

Q. All right.

A. If I found a mill—I believe you are trying to ask me if I found a mill that had a base price—

Q. Oh, no, no base price.

A. Or mill that had no base price?

Q. Yes.

A. Well, the mill that had no base price was meeting our quotations, then, or someone else that did have a base price.

Q. Did you figure out what the lowest net realization at the mill it was obtaining and put the base down to that point?

A. No, we evidently put the base in at what we thought at that time was the net on the stuff; that was into the area where we were doing business.

Q. In other words, you determined the base price that you would put in at such mills by the lowest mill net realization that you could figure out they were paying?

A. I don't suppose we figured all over the country to find whether that was actually the lowest or not. They might have been selling goods at some point that we don't know about that would have netted them a lower price than the ones we found.

Q. Well, you figured that they had cut below the des-

tination price that would have been arrived at by
13010 applying the lowest sum of base price plus freight to that particular destination?

A. In the area where we were doing the business.

Q. Yes.

Trial Examiner Norwood: He is talking about his general practice.

The Witness: Well, I assumed that it was general in answering the questions.

13012 *Cross-Examination by Mr. McPherson.*

Q. Mr. Rader, as counsel for the Consolidated Company, I just want to ask you one or two questions. On direct you told Mr. Wooden that a document you had in front of you, I think it was 1905-F,—

Mr. Wooden: A to F.

By Mr. McPherson:

Q. (Continuing.) —A to F was similar to one shown you by a representative of the Consolidated Company?

A. Yes.

Q. You don't undertake to say the documents were identical?

A. Well, no; similar, I said.

Q. Do you remember whether the document shown you by the Consolidated representative was dated or undated?

A. As I remember the document, it was the rulings issued by the Code Authority, put in convenient form to refer to, and the rulings written down on one side and the way of handling it on the other side.

Q. And you don't know whether the Consolidated Company issued that document to the trade or simply to its salesmen?

13013 A. I would think—no, I don't know that.

Q. And you don't know whether it was used solely during the existence of the Code Authority or whether it was used after that?

A. No, I don't know that.

13014 The witness doesn't recognize the letter, Com. Ex. 2264, or that he ever signed just that way. The witness thinks he knows about the letter, but he certainly didn't sign just "Rader" to a letter. He thinks he re-

calls the letter as one from him to the addressee on that subject.

"Q. Does it appear then that someone signed it with your authority, or, at least, this being a copy, that you signed or that one member of the Board of Trustees of The Cement Institute, acting as the Code Authority, might have signed it in that way for you?

A. Well, it is not my signature, and I don't think anybody ever sent out copies of a letter with just
13015 "Rader" on it, without any initials. I can't imagine that they would.

Q. Well, do we understand you to say that you do recognize the communication—

A. I recall the letter.

Q. —from you to the addressee?

A. I dictated the letter undoubtedly.

Q. You signed in your own handwriting, in your own signature, the letter you sent to the addressee?

A. I didn't say that. I don't know whether I did or not.

Q. Well, it was your practice to sign letters in your own signature, when you addressed them to persons, particularly to Mr. Barton W. Murray of the N. R. A., you signed your letters to him, didn't you?

Mr. Hershberger: I object to the letter as showing anything of the sort. He hasn't said he signed the letter in question, and what his usual practice was doesn't throw any light on the question.

Trial Examiner Norwood: The objection is overruled.

Mr. MacIntyre: I am asking Mr. Rader whether or not in his correspondence, that is, his letters to Mr. Murray of the N. R. A., he followed the practice of signing his letters or whether he had someone else to sign his letters for him.

A. They were signed by other people and myself, both.

13016 By Mr. MacIntyre:

Q. With your authority?

A. Of course.

Trial Examiner Norwood: Is there any objection to the proffer?

Mr. MacIntyre: The letter isn't offered at this time, your Honor.

Mr. Leisure: May I ask him: you don't know of any body just signing the name "Rader" to your letters?

A. I certainly do not, no.

By Trial Examiner Norwood:

Q. Do you recognize the handwriting there, that handwriting?

A. No, I do not recognize the handwriting. I recognize the letter. I think I wrote the letter. I don't know about the signature on it.

Trial Examiner Norwood: All right."

The witness doesn't specifically recall Com. Ex. 415-27 as a letter between him and Mr. Boettcher. He recalls that "we" had letters of this kind from several peo-
13017 ple about subjects of this kind. He doesn't specifically recall having had correspondence on that subject with Mr. Boettcher. He recalls that the Foreman plant at Arkansas was discussed by "us" with Mr. Boettcher. The witness probably answered that letter but he doesn't recall it at all. The handwriting and initials appearing in the upper right hand corner are not in his handwriting, but he would think they looked like Mr. George H. Reiter's; the witness has a faint recollection of having received a letter, Com. Ex. 415-41. He probably answered it, but he doesn't recall it. He
13018 doesn't recognize the stamp in the lower right hand corner as the receipt stamp of The Cement Institute. It probably is, but he would not say he knows the stamp. He couldn't even recall whether or not such a stamp was used by the mail clerk on incoming mail of the Cement Institute. It probably was, but he didn't have anything to do with it; the witness identified Com. Ex. 427K as undoubtedly a letter that he wrote, passing from the officers of the Code Authority to the concerns addressed thereon; that is his signature on the mimeographed
13019 stencil. The witness identified Com. Ex. 573L as a letter referred to the Chairman of the Committee for handling increases for new cement plants, or what-not during the Code Period. From the address, evidently the Chairman was Mr. Joseph "F." Young, president of the Lehigh Portland Cement Company; he could not identify Com. Ex. 574-M and N, but "we" had several letters of that kind and he thinks it was probably written by either him or Mr. Reiter of the Code Authority. He

doesn't recognize the handwriting in the words "copy to Mr. Rader" at the top of Com. Ex. 574-M. Evidently it was not written by "us", with that notation;
13020-21 the witness recalls hearing something about this letter, Com. Ex. 575-A and B, and heard that Mr. E. P. Lucas, Superior, Inc. wrote to Mr. Jesse H. Jones, Chairman of the Reconstruction Finance Corporation, and Lucas may have sent a copy to the Code Authority, the witness doesn't recall. It would come to the witness if Lucas sent it to the Code Authority. He doesn't know about that at that time. He doesn't know
13022-23 that he did get a copy of it then. The witness doesn't recall a letter, Com. Ex. 645-H to M inclusive. It undoubtedly came into the Code but he doesn't have any recollection of it. It looks like a letter, "That these fellows were objecting to something that the Code Authority had been doing." It probably came into the Code Authority. He is only taking it because it looks like it. He doesn't really recall it at all; he remembers something about that letter from Mr. Joseph S. Young of the Lehigh to the witness as vice president of the Lehigh, Com. Ex. 817-i and J, but it is really quite hazy.

Now, Mr. Rader, I show you a document marked as Commission's Exhibit 832-C, and ask you to state whether or not you recognize that, and if so, as what?

(Handing document to witness.)

13024 A. Yes, I recognize that as evidently an answer to a letter I wrote to him.

Q. Do you recognize Commission's Exhibit 832-D, and, if so, as what?

A. As the same thing as the other, evidently.

Q. That is the letter in reply to one that you had written Mr. M. C. Monday?

A. Right.

Q. What about 832-E?

A. It is apparently the same letter.

Q. That is, in reply to a letter?

A. A reply.

The witness identified Com. Ex. 832-F as evidently the letter that caused the witness to write these other letters. He recognizes it as a letter he received from Mr. H. S. Chaffee. He thinks he recalls the circumstances surrounding the correspondence that he had

with Mr. Chaffee on that subject at that time. He would think that Com. Ex. 832-G is the letter to which Com. Ex. 832-C, D and E is a reply. "That" is a letter from
13025 the witness to the people who wrote Com. Ex. 832-C, D and E; that is Mr. Scott, Mr. Monday and Mr. Condon. He would think that is what it is.

"Q. Mr. Rader, I now show you a document marked as Commission's Exhibit 836-T and ask you to state whether or not you recognize that, and, if so, as what? Do you recall Mr. Joseph S. Young calling it to your attention as a carbon copy of a letter he had received from Mr. B. S. Affleck of the Universal-Atlas Company or discussing the circumstances of the subject discussed therein?

A. No, I don't recall the correspondence.

Q. Do you recognize—

A. About the only thing I remember about it is, I remember Tinsdale's name. I remember that name as a fellow we had something to do with during the Code.

Q. Do you recognize the handwriting? Do you recognize the handwriting in the words "Air Mail" near the bottom of that letter?

A. No.

The witness recognizes Com. Ex. 839-KKKK as a letter that the witness wrote to Mr. Charles F. Con-
13026 don; Com. Ex. 913-WW and XX as an answer to a letter that Mr. Young wrote the witness to get him some data on the Clark and Burns investigation. As the witness recalls it, it was on some of the far western mills, "which he didn't have the data, of which I didn't have and, I wrote to someone out west there and asked them if they could supply it for me and they did, apparently, and 'I am forwarding it to Mr. Young' "; Com. Ex. 913-WW as his letter and he presumes Com. Ex. 913-XX as the material he forwarded. It looks like it (indicating); Com. Ex. 924-5R as a letter he wrote to Mr. Young; Com. Ex. 925-6A, 925-6B, 925-6C and 925-6D looking like a letter by the Code Authority notifying the various
13027 companies mentioned of a filing that had been made by someone for bidding on the T.V.A. cement. He has no specific independent recollection of correspondence of that character going out of his office. He had so much of it; He doesn't recall any particular one; Com. Ex. 933-3C as looking like a letter that was written by the Code

Authority office to Mr. Bowen regarding a complaint that had been filed. He recognizes his name in the signature form as having been written for him by Mr. George H. Reiter; Com. Ex. 933-5D as a letter the witness wrote to Mr. H. S. Chaffee in reply to a letter that he had evidently written to the witness asking the witness to meet him at Cincinnati, and the witness had apparently told him that he could not be there. Mr. Chaffee was at one time something in the Code Authority of the Dealers' Organization, and the witness in the cement industry. The witness testified "I was more or less kidding him
13028 about what he could do with his bunch when he was a Code Authority, when I couldn't do anything with mine when I was Code Authority." He doesn't recognize the handwriting, "N.A.F." for National Federation in the upper righthand corner; the witness thinks that he recognizes Com. Ex. 933-5E as a letter which he replied to. He recognizes it as a letter to which his letter, Com. Ex. 933-5D, is a reply; the witness recognizes Com. Ex. 947-15E as a copy of a letter which he described to counsel a while ago of his asking Mr. H. O. Warner to get some
13029 data for the Burns and Clark information of which he forwarded on to Mr. Young on the letter that counsel asked him to recognize a while ago; the witness recognizes the trade mark on Com. Ex. 971-33L to 971-34o inclusive; it looks like "our" circular booklet that we got out for "our" trade telling them how good "we" were and they ought to give us business. He recognizes the circular booklet to the trade entitled "Twenty Years of Dealer Protection." He could not say whether it is in its entirety, it looks like it is complete, as far as he knows. He recalls that his company issued such a book.

13029 Mr. MacIntyre: That is all.

Trial Examiner Norwood: Examine him.

Mr. Leisure: That is all.

Trial Examiner Norwood: Thank you, Mr. Rader.

(Witness excused.)

13030 B. F. AFFLECK, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am at present unemployed. I retired in 1936 as president of the Universal-Atlas Cement Company. I had been president of that company about 20 years. Before I became president of the company I was the sales manager for about 10 years and salesman for 10 years before
13031 that, salesman, stenographer, etc. My connection with the Universal-Atlas or with the Universal Company goes back to 1896. I retired from the presidency on July 1, 1936, but not effective officially until September 1, 1936.

Q. You were there at the time, I take it, that the Universal Company merged with the Atlas Company?

A. Yes.

Q. And thereafter was known as the Universal-Atlas Company?

A. Merged isn't correct.

13032 Q. You were with the Universal Company at the time that the properties of the Atlas Company were acquired by the Universal?

A. Yes.

Mr. Hershberger: Well, I still object. I don't believe that is accurate. Now, of course—

By Mr. Wooden:

Q. Will you tell us just what occurred that brought about the passing of the Atlas Portland Cement Company?

A. The United States Steel Corporation bought all of the assets of the Atlas Portland Cement Company and turned them over to the Universal Portland Cement Company, which changed its name to the Universal-Atlas Cement Company.

Q. And at that time the U. S. Steel Corporation owned all of the stock of the Universal Company?

A. Yes.

Q. Was that true from the beginning of the Universal Company?

A. Yes.

13033 Q. That it was 100 per cent owned by the U. S. Steel?

A. Yes, or its predecessor, the Illinois Steel Company, prior to the formation of the U. S. Steel.

Q. In other words, U. S. Steel was formed in 1901, wasn't it?

A. Yes.

Q. And you were with the Universal Company five years before that?

A. Yes.

Q. When it was a subsidiary of the Illinois Steel, is that correct?

A. Well, to get it technically correct, if it is important, in 1896 the Illinois Steel Company formed a cement company, and that department was incorporated as a separate company in 1906, under the name of Universal Portland Cement Company.

13034 Q. In other words, it ran from '96 until 1906 as a department?

A. Yes.

Q. Was it a department of U. S. Steel between 1901 and 1906?

A. No, it was a department of the Illinois Steel.

Q. All right. In what parts of the country did you exercise your function as sales manager?

A. I didn't get that.

Q. In what parts of the country did you exercise your function as sales manager?

A. Well, I was sales manager before the acquisition of the Atlas, and I was—I had jurisdiction over sales in all parts of the country until I became president, and then I had supervision, of course.

Q. Was there a time in those early days of your connection with the company when cement was sold on an F. O. B. mill basis rather than delivered?

A. No.

Q. You always sold strictly on a delivered basis?

A. Practically so.

Q. Well, what do you mean by "practically so"?

A. Well, the customer wanted the price delivered where he was to use the cement, and we naturally fell in with his desires and sold delivered.

13035 Q. In what cases didn't you sell delivered?

A. Well, I don't—as a matter of fact, I don't

think there are any cases where we didn't sell delivered. There was no demand, no request for anything but delivered price.

Q. Was there a time when you sold through distributors, wholesale distributors?

A. No.

Q. You always sell direct to the retail trade?

A. We sold to retailers and some business direct.

Q. Were there any times during your presidency of the company when you had mills that were not base points?

A. No.

Q. All your mills have always been base points?

A. Yes.

Q. I understand you to mean by that, at least, I intended my question to mean that, base points for pricing purposes.

A. Yes.

Q. Has your company within your knowledge established base prices at points where you didn't have mills of your own?

A. No.

Q. Did you ever establish a base point price at Cape Girardeaux?

A. No.

Q. Are you aware whether or not that method of pricing has been used by other companies within your knowl-
13036 edge? I mean by that, establishing base point prices at points where they did not have mills.

Trial Examiner Norwood: That means knowledge that comes to you in the due course of business.

A. I don't think I remember definitely. There may have been—I think there were in certain cases, but my memory is very vague.

By Mr. Wooden:

Q. Do you recall whether or not that method of pricing occurred to some extent during the depression years of 19'1, '32?

A. One company putting base prices on some other company's mill?

13037 Q. That is right.

A. I don't of my own knowledge recollect. I don't know.

13039 Q. I will ask you what effect that practice of establishing a base price at the mill of a competitor

—who is at the mill of a competitor where the establishing mill does not have a base, or doesn't have a mill, what that is.

13040 By Trial Examiner Norwood:

Q. Do you know what effect that has had in your experience?

A. Well, I think it is common knowledge that where one company puts in a base price at some other mill, the effect is, or, at least, the tendency is to reduce the net return that mill has been receiving.

By Mr. Wooden:

Q. Reduce it—

A. We didn't do that, and I am just giving this answer based on the simple arithmetic of the thing.

Q. Was it the making of a cut price on some business that led to that method?

A. I don't know.

Mr. Hershberger: Now, your Honor—

A. (Continuing) Never having done it myself, I don't know what the motive was.

By Mr. Wooden:

Q. You don't know what has been done in the trade?

A. No, nor what the motive of it was.

13041 The witness identified Com. Ex. 1953: as a copy of his letter to Mr. Kelly under date of March 4th, 1932. The initials "B.A.S." are the initials of the witness's stenographer.

Mr. Wooden: I offer Exhibit 1953 in evidence.

Mr. Leisure: We have no objection to it, except that we ask that it be received as binding only on the participants in the correspondence and the companies involved.

13042 (COM. EX. 1953 was offered and received in evidence.)

By Mr. Wooden:

Q. Referring to the second paragraph of your letter, Exhibit 1953, were the figures of 35 to 64 cents a barrel that you mentioned there the mill nets?

A. I think that is correct. I don't remember now. That is back in 1932, but my recollection is that there was some

as low as 35. Where there is a big group, one might be 35 and from there up.

Q. And the figures from 90 to 60 or 70 cents a barrel, that you referred to, in the same paragraph, did you have the mill nets in mind where those figures were mentioned?

A. I don't remember now, but I dictated that letter on that date and that must have been the correct figure.

Q. Well, I am not asking about the figures, but what you meant by the figures. Did you have the mill nets in mind? Were those the mill net figures that you gave there?

A. Oh, yes, the mill nets at the mill, yes.

Q. Did you think it a crime to reduce your selling price when there was an unpreventable shrinkage in demand?

A. Well, crime in that connection is, technically,—with lawyers here, of course, it wasn't a crime, but they call it
an economic crime and that is what I meant and that
13043 is what I repeat.

Q. You don't think the price ought to go down when the demand shrinks?

A. I don't think I said that, but in answer to your question I will say, I will answer that "No." And I might qualify that, not unless by lowering the price volume can be increased substantially. That is a simple rule in arithmetic and economics and merchandising.

Q. You referred to the unpreventable shrinkage in volume, I believe, in your letter?

A. Yes.

Q. And said it is bad to reduce your price in the face of that shrinkage?

A. It didn't prevent the shrinkage. I might add, in fact, I think some charts that I made at the time, if I am not speaking out of turn—

Q. All right.

A. —I think some charts indicated plainly that the shrinkage in volume was a sharper shrinkage than the shrinkage in price, and not until their price rose was there an increase in volume.

Q. What was the cause or causes as you saw them, for that very substantial reduction in prices during 1931 and '32?

A. In 1929 there was a visible falling off in the volume
of business, and along with that falling off different
13044 companies desirous of maintaining their absolute
volume of business instead of relative, began cutting

prices and that price cutting practice in an effort to maintain individual companies' volume got worse and worse until the effect was what was indicated in that letter.

Q. By cutting prices do you mean that they quoted destination prices that were less than the sum, the lowest sum of mill base plus freight from mill base to destination?

A. Yes.

Q. In other words—

A. (Continuing) The mill base, socalled, plus freight was pretty much disregarded and the destination price was named, oh, more or less regardless of any base.

Q. In other words, the price cutting manifested itself in the disregard of the basing point system of quoting, did it not?

A. Very largely, but the prices were quoted at destination, however. You know, the price was at destination—

Q. Yes.

A. —even though there wasn't any reference or attention paid to how the price at destination was ar-

13045 rived at.

Q. It was cut below the—

A. Yes.

Q. —the regular destination price?

A. Well, each fellow cut below what he thought somebody else was quoting. It was just a seesaw down until it got into bad shape.

Q. Can you name any particular companies that were active in that process of price cutting that you refer to?

A. I don't think I can name any. Specifically, I would say they all did except us. I don't think we did any.

Q. Was the Marquette Company active in that?

A. I suspect they did some.

Q. Were they unusually active in that respect?

13046 The Witness: I don't know.

By Mr. Wooden:

Q. I mean by comparison with your other competitors, does the Marquette Company stand out as one of the leading price cutters during that time?

A. I was not sales manager, and I don't remember, Mr. Wooden. They are all active enough, of course,—

Q. Can you state whether or not you experienced, or what your experience was that the Marquette Company made more or less of a habit of cutting prices on state highway bids.

13047 By Mr. Wooden:

Q. Well, you define it any way you like, and answer it, and qualify it any way you like.

A. As I remember, back six or seven years ago, when we had this period of price demoralization, I think the Marquette Company was among the most aggressive and active and destructive of our competitors from the standpoint of getting business away from us.

By Mr. Wooden:

Q. Can you name others that you would put in that category?

A. Well, as I said a while ago, I put them all in that category. I don't think I can grade them from 100 down to zero or vice versa.

Q. Would you put Marquette at the top of the list?

A. I don't know as I would.

Q. Who would you?

13048 A. I think I would put them all at the top of the list or pretty close to the top.

Q. Doesn't that appeal to you as being inherently impossible, that they were all equal in degree in their price cutting tendency?

A. Well, as I said before, these things didn't come immediately to my attention. It went up through the sales department, and the period you are talking about is back in '31 and '32 and '33, and I don't remember.

Q. Do you recall whether or not in the summer of 1932 prices were advanced by as much as 40 cents a barrel?

A. I don't remember, Mr. Wooden.

Q. Do you remember any advance during the depression period of anything like that amount?

A. I don't remember what the prices did after getting down to the extreme low level. Prices did gradually rise. Now, just when and how much, I don't know.

Q. Do you recall whether or not they rose 40 cents on a given date?

A. No.

Q. Have you occupied any official position in The Cement Institute?

A. I think I was trustee, trustee or director. Trustee I think they called it, trustee at large I think was the designation that I had.

13049 Q. That is distinguishable, I suppose, from the trustees by districts?

A. Yes. I think the procedure was to elect a trustee for each district, and then those trustees elected two or three trustees at large. I think I was one of the trustees at large.

Q. Do you know who the other trustees at large were now?

A. I don't remember.

Q. You are sure that there were others besides yourself?

A. I think there were two or three altogether.

Q. What functions did you have as trustees at large?

A. The trustee at large function was the same as the district trustees, as I remember it. They all had equal authority and all had the same vote.

Q. Did you have any district organization that you affiliated yourself with as trustee at large?

A. No.

Q. Did you have meetings of district members?

A. The district—yes. The district members had meetings, if I remember correctly, and elected their trustees. I don't remember whether I ever attended any of those meetings or not. I think I probably did, but I don't remember.

Q. Did the district members have meetings from time to time after they elected their trustees?

A. I don't remember any.

13050 Q. Is that the only position with The Cement Institute that you have held?

A. Yes.

Q. Have you been head of any committees of The Institute?

A. I was chairman of a committee called, I think, the committee on public relations, or something like that for a while.

Q. During what time?

A. Well, I don't remember.

Q. What were the functions of that committee?

A. As indicated by the title.

Q. Can't you enlarge on that any?

A. I think the title is fairly accurately explanatory. We felt that the cement industry was occupying a wrong position in the eyes of the public, and we wanted to correct that opinion.

Q. Did you serve with a body known as The Cement Information Bureau?

A. I don't think so. When was that?

Q. Did you ever hear of the Cement Information Bureau?

A. Well, the name seems familiar. There was a Cement Information Bureau way back. I think that was sort of a forerunner of The Cement Institute.

Q. Do you recall a Mr. John Reynolds in connection with the Cement Information Bureau?

13051 A. Oh, yes, yes. He was employed by the committee on public relations, if that is the correct title. He was employed by them for a short period of time. It came into being and passed out in a few months, if I remember correctly.

Q. Was he employed to prepare a program for the public relations committee?

A. Yes, to—well, I think the members worked out the program, and he worked out the details on it.

Q. Do you recall that the Cement Information Bureau put out circulars or had communications with members of the industry regarding the program?

A. I suppose they did, but I don't remember a thing about them.

Q. I am showing you papers marked as 2190-A to J, for identification. Have you seen that before?

A. Your question is whether I remember seeing it before? I don't but I think I did. I think I did.

Q. I don't mean the identical thing.

A. A similar thing.

Q. Yes. Was that one of the pieces of work done by the Cement Information Bureau?

A. I suppose it was.

Q. Was it distributed in the trade?

A. I couldn't tell that at all. I suppose it was.

13052 Q. Do you recognize it as a—

Mr. Hershberger: I want to object to suppositions.

A. This is five years ago, and I have been out of business for—

Trial Examiner Norwood: Motion denied.

A. Well, I couldn't testify that I had ever seen a similar document.

Mr. Hershberger: Well, now, your honor—

The Witness: Nor will I deny that I had, because I may have. That is quite a document.

13055 By Mr. Wooden:

Q. I show you, Mr. Affleck, a paper that is in evidence as Exhibit 882-6P and -6Q, being a letter from the Green Bag Cement Company, addressed to you as Chairman of the Committee on Public Relations, dated April 11th, 1934, and acknowledging receipt of your communication of April 10th and enclosures.

(Handing documents to witness.)

Q. Did you or did you not say that this paper marked 2190-A to J, inclusive, for identification, was sent out by you under date of April 10th?

(Handing document to witness.)

A. I don't know. Do you want me to read this?

Q. Well, just enough to enable you to answer the question. You can read it all, if you like.

A. I have no recollection of getting this letter from Meyer, but I might have got it.

Q. Well, that wasn't the question.

A. And if—.

13056 Q. That wasn't my question, of course.

A. Well, where is my letter of April 10th? If you can show me that, that might help.

Q. I don't have that available and don't know whether I have it at all or not. Will you produce your letter of April 10th and the enclosure that accompanied your letter of April 10th?

A. I am entirely unable to do that, because I retired from the company in 1936 and I have no access to the files at all.

13058 Mr. Wooden: Well, as I understand, such papers as the company could produce were produced by Mr. Lindahl under this subpoena, and this particular statement represented by 2190 they could not locate. At any rate, it wasn't produced by Mr. Lindahl, and I think he said they could not locate it.

Now, is there any reason why this paper may not be offered and received subject to its check as to being an authentic document that was prepared by the representatives of The Cement Institute?

Mr. Leisure: May we see it? I haven't seen it, Mr. Wooden.

Trial Examiner Norwood: How is that marked? What paper is that? How is it marked?

Mr. Leisure: It is marked Exhibit 2190-A.

Mr. Wooden: A to J.

13059 By Mr. Wooden:

Q. Did the Public Relations Committee, Mr. Affleck, have a certain allotment of funds for its activities?

A. I think we did.

Q. Will you state about how much it amounted to?

A. I don't remember. Some few thousand dollars. I don't remember how much. It was soon exhausted
13060 and the activities ceased.

Q. Did the Public Relations Committee employ any one besides this Mr. Reynolds that you referred to?

A. I don't think so.

Q. Did you have a man by the name of McByrnes at the Universal-Atlas Company working with the Public Relations Committee?

A. Yes.

Q. What did he do?

A. He, if that is the correct copy of the statement of policy, he would have had something to do with preparing that.

Q. You think he did have something to do with it?

A. I can't say positively, but that would fall within the scope of his duties.

Q. The scope of his duties as an employee of Universal-Atlas?

A. Yes.

Q. What were his duties there?

A. Publicity manager.

Q. Did you have a man by the name of Curtiss, A. J. R. Curtiss, working for The Cement Public Relations Committee?

A. No, Curtiss was and is connected with the Portland Cement Association.

Q. Did he do some work—

13061 A. He made available some statistics and various other material.

Q. Made it available to the—

A. Yes, to The Cement Institute, or to me personally, I think.

Q. For the Public Relations Committee?

A. Yes.

13062 Q. Showing you papers marked as 1905-A to F, for identification, have you seen anything similar to that before?

A. I don't remember a thing about this, Mr. Wooden. This has no name or date at the top.

Q. Did anything like that come to your attention while you were with the Universal-Atlas?

A. Well, not while I was president. "Method of Marketing Cement." I don't know what it is all about.

Mr. Paulson: Well, take time to read it.

The Witness: Read all this. I thought I was excused. Six pages of it.

Mr. Hershberger: Is this witness being recalled for direct examination?

Trial Examiner Norwood: Evidently, yes.

Mr. Wooden: Call it that if you like.

Mr. Zimmerman: Just a question or two, I suppose.

A. I don't remember a thing about this and don't remember ever seeing anything like it.

By Mr. Wooden:

Q. Well, I am now showing you a paper marked 13063 as Exhibit 1942-A to E, for identification, which is headed "Method of Marketing Cement in Texas", and which was produced here by your Mr. Lindahl. Do you recall that document?

A. No.

Q. Just referring to this, now (indicating).

A. No.

Q. I am showing you papers marked, for identification, as Commission's Exhibits 1942-A to E, inclusive, and for your information say it was produced here by your Mr. Lindahl under subpoena.

13064 Were you with the company as president on September 10, 1935?

A. Yes.

Q. Did any paper like 1942-A to E come to your attention?

A. I don't think so. I don't remember it.

Q. Who in your organization would have charge of the preparation or issuance or use of such a paper as 1942-A to E?

A. The vice president in charge of sales or someone in his office.

Q. Who was that?

A. Or the sales manager at Kansas City.

Q. You mean the vice president in charge of sales? Is that Mr. Stone?

A. Yes, at that time.

13065 Mr. Wooden: Mr. Hershberger, I would like to offer—and I address you particularly because this concerns the Universal-Atlas—I would like to offer at this time Commission's Exhibit 1942-A to E, inclusive, and 2265, subject to your check as to whether they are authentic papers of the Universal-Atlas Company.

Mr. Hershberger: Were these furnished you by our people?

Mr. Wooden: This was brought in by Mr. Lindahl.

(A discussion ensued off the record.)

Mr. Hershberger: I have no objection to No.

13066 2265 going in subject to check.

Trial Examiner Norwood: Yes.

Mr. Hershberger: I do object to 1942-A to E.

Trial Examiner Norwood: Yes.

Mr. Hershberger: Because there is no showing, so far as I know, that this has anything to do with the Universal-Atlas Company. It is unsigned, unaddressed document that has nobody's name on it. I don't think there is any basis for 1942-A to E.

(COM. EX. 2265 was offered and received in evidence.)

13069 The witness identified Com. Ex. 440 as a letter dated April 5, 1934 from him, as Chairman of the Committee on Public Relations of The Cement Institute to Blaine Smith, president of the Penn Dixie Cement Corporation.

Q. Now, Mr. Affleck, I call your attention to a statement in that letter, the last sentence of the third paragraph, beginning with the words, "This plus contacts" and ending with the words "work at small cost," and ask you in that connection, after referring to Commission's Exhibit, for identification, 2190-A to J whether or not the correspondence division referred to in the sentence on 440, to which I have made reference, is the correspondence division referred to in the second paragraph on

13070 Commission's Exhibit, for identification, 2190-H?

A. Well, that is pretty long.

By Mr. MacIntyre:

Q. Please make a study of those two references and see if they refresh your memory and recollection?

A. The correspondence division, page 8, where is it, where is page 8?

Q. There (indicating), is correspondence division referred to on page H, which is Commission's Exhibit, for identification, 2190-H.

A. Now, after the long preamble, what is the question?

Q. As to whether or not the correspondence division referred to in the last sentence of the third paragraph of Commission's Exhibit 440 is the same correspondence division referred to in the second paragraph of Commission's Exhibit, for identification, 2190-H.

A. Well, I don't know.

13071 Q. Well, I will ask you another question about 440.

A. You will have to make it—440?

Q. In this letter which you have identified, the letter marked as Commission's Exhibit 440, which you have identified as a letter from you to Mr. Blaine S. Smith, you opened with this statement: "Here are the plans and recommendations prepared by the Public Relations Committee mentioned in our letter of April 4th."

Now, I will ask you whether or not the document marked as Commission's Exhibit, for identification, 2190-A to J and dated April 10th, 1934, the same date as appears on Exhibit 440, is the public relations plan referred to in 440?

A. I think it probably is. Is this an authentic copy? I don't know.

Q. Now, referring you again to 440, and with as much study as is necessary on your part to clearly recall the substance of it, and then again referring to 2190, I would like you to state whether or not your recollection and memory is that 2190 is one of the mimeographed copies of the plan that you sent to Mr. Blaine Smith on April 10th, 1934, as referred to in 440?

A. Well, all I can say is that it looks as though it was. I wouldn't know positively.

Q. You were chairman of the Public Relations Committee and circularized the industry, as is repeated by this letter—

13072 A. Yes, I know, but I personally—

Q. Can't you—

Trial Examiner Norwood: Now, one at a time, please.

A. I personally did not prepare all of this stuff, and this (indicating) isn't my signature.

By Mr. MacIntyre:

Q. Who signed that for you?

A. That is my secretary's signature, but I recognize that as ours.

Q. And what is your secretary's name?

A. Engwald. That is her writing, not mine.

Q. Well, did you, as chairman of the Public Relations Committee of The Cement Institute, leave all of the work of correspondence, and everything else, to subordinates?

A. No, not all.

Q. You do not recall any of the documents that were prepared by you or by your subordinates while you were acting as the chairman of the Public Relations Committee of The Cement Institute?

13073 The Witness: Well, your question is that I don't recall any of them?

Trial Examiner Norwood: Any of them.

By Mr. MacIntyre:

Q. I asked you if you recall any.

A. Well, now, I will have to ask you to define "recall." This is nearly five years ago, and I have been out of business for nearly three years, and I have not attempted to carry these things in my mind. There was a procession of things passing over my table all the time.

Q. Well, I will ask you this question, Mr. Affleck: Is there any doubt in your mind that the public relations plan referred to in the first paragraph of your letter to Mr. Blaine Smith under date of April 10, 1934, being Commission's Exhibit 440—do you have any doubt that the public relations plan there referred to is any other than that which is Commission's Exhibit, for identification, 2190-A to J, a mimeographed copy?

A. I would answer that as I did before, that it is probably the document referred to here.

13074 Q. Well, do you have any doubt that it is the document?

A. When I say it is probably, I certainly have some doubt. I can't identify—

Q. What is the basis of any doubt that you do have on that as to its being the document referred to in the first paragraph?

A. Because my memory isn't clear as to whether this is. I think it is.

Q. You think it is?

A. Yes, but I couldn't be certain about it.

Q. Well, are you reasonably sure as to your belief that it is the document referred to in Commission's Exhibit 440?

Mr. Hershberger: I don't see any use—

The Witness: It looks like the same document. I am under oath here. I couldn't swear that it was. I think it probably is, but I have some doubt.

By Mr. MacIntyre:

Q. You handled the document that you sent to Mr. Smith as an enclosure with Commission's Exhibit 440; did you not?

A. I handled it personally?

13075 Q. Well, at some time during its preparation or distribution.

A. The document that went with this letter?

Q. Yes.

A. Probably never had my hands on it. That was handled by someone in my office.

Mr. MacIntyre: If your honor please, keeping in mind the witness' testimony that he thinks that the document, for identification, 2190-A to J, is the document referred to in the first paragraph of Commission's Exhibit 440, I now offer 2190-A to J in evidence.

Mr. Hershberger: Well, I want to state an objection, your honor. Keeping in mind the witness' evidence that he isn't sure and has some doubt as to whether it is, I think there has been no proper foundation laid for its introduction at this time.

Trial Examiner Norwood: What further identification have you for this paper? Was it produced from the files of one of the respondents?

Mr. Wooden: That particular paper was among the files of the Aetna Portland Cement Company. I might have asked Mr. Cree to identify it, but I didn't, thinking that I wouldn't have near so much trouble getting the identification elsewehre. If I had it to do over, I would ask him about it, certainly.

13076 Mr. Hershberger: Isn't that the document that a while ago we agreed Mr. Leisure would look over? What is the purpose of going into any further argument? Nothing further has developed.

Mr. Leisure: Yes. Why are we spending time on it?

Trial Examiner Norwood: I shall permit the respondents to check it overnight and we will see what we can do with it tomorrow morning. In the meantime, I will review the record here as to what this witness said about it.

Mr. MacIntyre: We will turn over to the respondents' counsel, Commission's Exhibit, for identification, 2190-A to J, for their checking tonight. We merely wanted while this witness was on the stand to refer to this Commission's Exhibit 440 and the references in it to a public relations plan of the Cement Institute in an effort to have him, if he can recall, give the connection between the two.

Trial Examiner Norwood: Go ahead.

By Mr. MacIntyre:

13077 The witness identified Com. Ex. 418 G: as a letter dated August 13, 1937, from Mr. S. T. Crapo; Com. Ex. 439 A and B: as a circular of which the witness only has the vaguest recollection, although (it) was signed by himself as chairman with the other members of the committee. He presumes that it is authentic. He has no other independent recollection of it at this time. The witness was shown documents marked as Com. Ex. 821 4S to 4X inclusive, the letter dated March 24, 1934, from A. P.

13078 Meyer, of the Green Bag Cement Company of Pennsylvania, to the witness as chairman of the public relations committee, concerning a prospective public relations plan of the Cement Institute, and asked whether he recognizes and remembers it. He said that he doesn't remember this.

"Q. Do we understand you to say that you do not recall that during the latter part of March, 1934, you directed letters to quite a number of men who were leaders in the cement industry asking for their reactions to a proposed plan of public relations for The Cement Institute?

A. I don't remember, Mr. MacIntyre."

The witness identified Com. Ex. 836 T as a letter from him to Mr. Charles Conn, Blaine Smith and B. H. Rader. He recognizes the handwriting below the words "air-

13079 mail" as his handwriting. This is on our letterhead. He thinks that this is all right.

13080 Q. I believe in response to one of the questions Mr. Wooden asked you, you stated that Mr. A. J. R. Curtiss, who is connected with the Portland Ce-

ment Association, did do some work with you and for you in connection with the public relations work of the Public Relations Committee of The Cement Institute.

(Handing document to witness.)

A. He advised with us and may have made available some figures or statistics, and so forth, but that is about all.

Q. Do you recognize the initialed signature appearing on Exhibit 836-2L?

A. Yes.

Q. As that of Mr. Curtiss?

A. Yes.

Q. I believe you also stated in response to a question by Mr. Wooden that Mr. John B. Reynolds served you in connection with your work as chairman of the Public Relations Committee of The Cement Institute?

A. Yes.

The witness cannot identify the signature appearing on Com. Ex. 879 S: as that of Mr. John B. Reynolds.
13081 He wasn't familiar enough with it. It may be or it may not be. The witness identified Com. Ex. 879-U: as a letter from him, as chairman of the Cement Institute Public Relations Committee, to Charles L. Hogan, president of the International Cement Corporation. He does not know a thing about the handwriting appearing in pencil in the upper lefthand corner, or in the righthand margin. He doesn't know anything about the notations there; Com. Ex. 879-W: as a letter, dated April
13082 9th from him, as President of the Universal Atlas Company, to Charles L. Hogan, President of the International Cement Corporation; Com. Ex. 879-3P: as a letter dated April 6, 1936 from him to Charles L. Hogan; Com. Ex. 882-6X and 882-6Y: as presumably
13083 a circular letter to members from the Committee on Public Relations of the Cement Institute with the witness's name and [the name of] other members of the Committee in pen and ink; Com. Ex. 916-G, 916-H
13084 to 916-J inclusive: as a circular letter from the Committee on Public Relations persumably to members of the Institute, transmitting copies of advertisements which appeared in Time, Business Week, Editor and Publisher, and United States News; the witness presumes that it was advertising bought and paid for by the Public Relations Committee of the Cement Institute with funds

of the Cement Institute; Com. Ex. 950-B: as a letter from the Public Relations Committee, dated March 21, 1935, presumably to the members of the Cement Institute; Com. Ex. 950-E: as a letter, dated March 21, from him as
13085 chairman of the Public Relations Committee to the other members of the Committee; the witness was shown Com. Ex. 950-F, 950-G, 950-H, 950-i and 950-J and asked whether or not he recognizes those as portions of the proposed plan which were referred to in 950-E. He said that he recognizes this letter. He recognizes the next one, 950-F and G, as presumably, a circular letter from the Committee on Public Relations to the members of the Institute; Com. Ex. 950-H as a circular letter from the Committee on Public Relations to members of the Institute; Com. Ex. 950-i and J, without reading all this, but simply based on these names, here, and his name as chairman, "and the fact that these were—in whose files,
13086 ours?" as a letter from the Public Relations Committee to members of the Institute. The witness is basing that merely on the appearance of the letter rather than the contents.

Q. You don't remember all of the contents?

A. Not of this series here, not all of that.

Q. That is, you do not recall the entire contents of the letter?

A. Not entirely.

Q. From reading the contents?

A. No.

13087 Q. Mr. Affleck, I now show you a document marked as Commission's Exhibit 953-E, and ask you to state whether or not you recognize it, and, if so, as what?

The Witness: I don't know a thing about it.

Trial Examiner Norwood: Whether it was something that was circularized.

The Witness: No, this is a telegram.

By Mr. MacIntyre:

Q. What about the handwriting appearing at the bottom of that? Is that your handwriting?

A. It is not.

Q. Do you recognize it as the handwriting of anyone?

A. I don't know. It is not my handwriting.

13089 Chicago, Illinois,
January 10, 1939.

13091 B. F. AFFLECK resumed the stand and testified further as follows:

Cross-Examination by Mr. Hershberger.

Q. I ask you to look, Mr. Affleck, at Commission's Exhibit 879-3P, being a letter that you referred to yesterday in your direct examination, a letter from you to Mr. Hogan. Will you please tell me the circumstances under which that letter was written?

13092 A. Yes. Senator Wheeler, as chairman of the Interstate Commerce Committee of the Senate, was holding hearings on the so-called anti-basing point bill, three or four days' of hearings, at which I was one of the witnesses, and others, Mr. Hogan and Blaine Smith, and two or three others.

In the course of the hearing, the matter of basing point prices came up, and Chairman Wheeler asked me about our basing points, and I said I would give him our basing point prices, give him our price at our basing point, as this letter says.

Q. And that—

A. And I did so by mail, but made an error in—there is a misunderstanding, a little error there. Waco, $1.75 plus tax in Texas.

Q. Well, now, Mr. Affleck,—

A. And I merely wanted to—oh, and then Browder, referred to here, Earl—no, not Earl Browder—Dick, traffic manager of the Pennsylvania-Dixie Cement Corporation, that is, Blaine Smith's company, before he came to us, and Browder being a traffic manager in the room—

Q. In what room?

A. In the hearing room, in Washington.

Q. Yes.

A. He was going to get the basing points from those in the room. "One afternoon last week." That was the hearing. I gave him $1.75, "and I suppose you did
13093 the same, but that is really not the price used on commercial business in Texas. The base used is $1.80."

My purpose in writing that letter was merely to give Senator Wheeler of the Senate Interstate Commerce Committee the correct figures and not have some errors in the figures.

Q. You were quoting from your letter when you said "I believe Browder got basing point prices from those in the room one afternoon last week. I gave him $1.75, and I suppose you did the same."?

A. Yes.

Q. You were quoting from this letter?

A. Yes.

Q. So that the sum and substance of this statement is that you were furnishing Browder with your base point prices because Browder at this hearing before the Senate Interstate Commerce Committee had agreed to furnish Senator Wheeler with basing point prices?

A. Yes; yes.

Mr. Hershberger: I think that is all.

Trial Examiner Norwood: Any further cross-examination?

13094 *Redirect Examination by Mr. Wooden.*

Q. Mr Affleck, was your company accustomed to giving the Engineering News Record information regarding your base point prices?

A. I think we were. I think they sent out a form to us and some other companies monthly, or something like that, about our prices.

Q. Is that 5 cent tax—

A. (Continuing) That hasn't come to my attention for a number of years, but I think that was the correct procedure.

Q. Is that 5 cent tax in Texas a sales tax of some kind?

A. Yes, State tax applicable in Texas, not on shipments out of Texas. I think that is correct.

Q. Is it a flat tax of 5 cents per barrel as imposed by the State?

A. I think so. That is, my recollection of it was that.

Q. Or is it a 5 cent approximation of what the tax is in your figures?

A. Well, I don't remember. You mean a percentage, or something of that sort?

Q. Yes, does it actually figure out 5 cents a barrel or is that the way you approximate the tax in your prices?

A. I don't really know. What we used was 5 cents. Now, it may have been a fraction over or under that.

13095 I don't remember how the tax was arrived at.

Mr. Wooden: Your Honor, I would like to ask one question that I overlooked on direct yesterday, while Mr. Affleck is here.

Trial Examiner Norwood: Go ahead.

By Mr. Wooden:

Q. Mr. Affleck, referring to your testimony yesterday that Universal-Atlas had not at any time put in a base price at the mill of another company and where Universal did not have a mill, was that a consciously adopted policy not to do that?

A. No, it wasn't any policy. No occasion arose where I thought such a course was called for, and I don't think I would have been inclined to do it anyway.

Q. That is what I was getting at by my question.

A. But I had never given the matter any special thought.

Q. I wanted to find out whether you thought there was anything about such a method that you would not have felt like following it.

A. Well, I would say that I would not disapprove or approve it, but never having come to my—never having had any urge to do it, I never did it, and I don't think I would criticize any one else for doing it if he thought—

Mr. Wooden: All right, that is all.

Mr. Hershberger: That is all.

Mr. Leisure: That is all, Mr. Affleck.

13096 Trial Examiner Norwood: Thank you, Mr. Affleck.

(Witness excused.)

Mr. Wooden: Your Honor, when Mr. Rader left the stand yesterday, he was requested to produce a copy from the files of the Lehigh Company of a statement which he had described in his testimony as being there and covering the subject of the method of marketing cement. I have in my hands a paper which has been marked, for identification, 2266-A to F, inclusive. The paper was handed to me this morning by Mr. Jacques, attorney for the Lehigh Company, and he tells me it is the paper which Mr. Rader produced pursuant to his undertaking yesterday.

I at this time offer Exhibit 2266-A to F.

Trial Examiner Norwood: Is that identical with 2190-A to J, for identification?

Mr. Hershberger: No, it is not. Off the record.

Trial Examiner Norwood: Yes.

(A discussion ensued off the record.)

Mr. Wooden: This is the same as 1905, I believe, if I am not mistaken, a duplicate of 1905.

Trial Examiner Norwood: 1905-A to F?

Mr. Wooden: Yes.

Mr. Hershberger: Well, there has been no contention made to show that it was the same as 1905, has
13097 there?

Mr. Wooden: I grant that, but it appears to be after a casual inspection.

Mr. Hershberger: I don't think the record shows that it is the same and unless they are compared—

Mr. Wooden: I should say this, that 1905-A to F, has no date, while the document just produced bears the date May 28th, 1935.

Trial Examiner Norwood: You offer this 2266 and withdraw 1905-A to F?

Mr. Wooden: Well, 1905-A to F has not been offered.

Trial Examiner Norwood: It has been marked?

Mr. Wooden: It has been marked, yes. That can just stand for the time being for identification.

Trial Examiner Norwood: Off the record.

(A discussion ensued off the record.)

Trial Examiner Norwood: Are there any objections?

Mr. Leisure: I have no objection.

13098 (COM. EX. 2266-A to F was offered and received in evidence.)

Mr. Leisure: I may say that we checked 2190-A to J yesterday, and I am prepared to say it is a pamphlet or a writing, or whatever the description of it is, issued and sent out by the Public Relations Committee of the Institute.

(COM. EX. 2190-A to J was offered and received in evidence.)

Mr. Wooden: I also offer at this time 2264, for identification, a paper identified yesterday by Mr. Rader.

13100 Mr. Wooden: I might say, your honor, it was written at a time and concerning the subject of the Government's desire or the President's request for an F. O. B. mill pricing from the industry.

(COM. EX. 2264 was offered and received in evidence.)

J. D. SCOVEL, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am employed by the Universal-Atlas Cement Company in the Chicago office as assistant vice president
13101 and my duties are particularly in the sales department. The function which I performed in the handling of sales is a multiplicity of detailed work that actually is involved in the supervision of what is known as the Western Region Territory, which includes from Saulte Ste Marie west including the north part of the state of Wisconsin, everything west of the Mississippi River, as far west as we sell cement, which takes in Nebraska, Kansas, Texas, New Mexico and a little in the eastern part of Montana, not in Wyoming. I am not in direct charge of the company salesmen in that territory. They are under the supervision of the sales managers of various offices. We do not have a sales manager at each mill but we have sales
13102 offices which are at Minneapolis, Des Moines, Kansas City and Waco, Texas. The sales managers at those points report to the office that I am connected with. My immediate supervisor is Mr. Rohwer. I travel very little in the territory that I named. I have been connected with the company since 1909. I have held that position of assistant vice president since August 2, 1937. Just prior to that I was assistant in the general sales since some time in the middle of 1931.

Q. I am showing you a paper marked, for identification, as Commission's Exhibit 1949. It was produced here by Mr. Lindahl, your company auditor, under subpoena. It appears to be addressed to Mr. Rohwer, "Attention Mr. Scovel."

13103 Do you recognize having received that letter or having had it come to your attention?

A. Well, there is nothing on here to indicate that I personally saw it, but my recollection is that I did.

Q. Who is—

A. That is, that I personally saw it at the time it came in.

Q. Who is the Mr. Boice who appears—is that Mr. Boice? No, it is Hull. Who is the Mr. Hull who appears as the writer of the letter?

A. He was chief clerk of the Waco office at the time this was written.

Q. Of your company?

A. Yes.

Mr. Wooden: I will offer this Commission's Exhibit 1949 in evidence.

Mr. Leisure: The only objection we have to this exhibit, your honor, is that it is an inter-office communication from a Mr. Boice, sales manager—

Mr. Wooden: Is it Boice?

Mr. Leisure: To Mr. Rohwer. Isn't it C. H. Boice?

Mr. Wooden: I made the same mistake, I think. I thought the name was Hull.

Mr. Leisure: I beg your pardon?

13104 Mr. Wooden: Hull.

Mr. Leisure: Well, there is a printed signature and a written signature. I was reading the written one. The exhibit number I am referring to is 1949. It was written on the letterhead of the Universal-Atlas Cement Company, and we request that if it be received, it be confined to the company involved and not received as binding against any other company.

Mr. Hershberger: We have no objections.

(COM. EX. 1949 was offered and received in evidence.)

Q. What is the signature to the letter, Mr. Scovel?

A. There are two signatures. One is typed "C. H. Boice" and the other is signed "Mack Hull."

Q. That is, the handwritten signature is Mack Hull over the name of C. H. Boice, or under the name of C. H. Boice?

A. Yes, it is. You say is it Hull's?

Q. Yes.

A. Personally? I don't know. It says "Mack Hull."

Q. That is what it reads?

A. It reads "Mack Hull."

13105 Q. You are not sure that it is his handwriting?

A. I don't know, no. I mostly see his initials. I don't see his handwriting often enough.

Q. Can you tell us who Mr. Hull was—who is Mr. C. H. Boice?

A. He is the sales manager of the Waco office.

Q. And Mr. Mack Hull is under him, chief clerk?

A. Chief clerk under him.

Q. With reference to this state tax on cement, is that state tax calculated by the state authorities as so much per barrel or as a percentage?

A. Simply a cent and a quarter per hundredweight of cement.

Q. And does that figure 4.7 cents a barrel as stated in this letter?

A. Yes, sir, 376 pounds to a barrel of cement times a cent and a quarter a hundred.

Q. And has it been the practice of your company to add 5 cents per barrel to cover the state tax instead of four and seven-tenths cents as it exactly figures?

A. It has been.

Q. You get three-tenths of a cent per barrel more than the actual tax, then, is that correct?

A. Yes, sir.

Q. How long has that been the practice?

13106 A. My recollection is shortly after the tax went into effect, which was back in 1931, the latter part of 1931.

13107 By Mr. Wooden:

Q. Did your company have up with the railroads the matter of substituting Government bills of lading for commercial bills of lading on any shipments in Texas?

A. I don't recall any such action.

Q. Did your company represent to the railroads any objection or opposition to their permitting the substitution of Government bills of lading for commercial bills on Government shipments?

A. I have no recollection of that.

The witness identified Com. Ex. 2267 A, B and C as papers that were made up by him in connection with a bid on cement for a job on the Hamilton Dam in Texas. All

13108 three papers are headed the Hamilton Dam. The papers are in the witness' handwriting. The witness is looking to see if anybody else had any notes on "here" in somebody's else's handwriting. He doesn't see any. The handwriting in parenthesis is his too, and his initials are near the bottom of the first page. The parenthetical note near the bottom of the second page is in his handwriting. His intials are at the lower right hand corner of the third page.

13109 Mr. Wooden: I offer those in evidence.

Trial Examiner Norwood: Any objection?

Mr. Leisure: Only that it be received only as against the company that it concerns and no others.

(COM. EX. 2267-A, B and C was offered and received in evidence.)

13110 Q. Was this Hamilton Dam business for delivery at Beverley, Texas, sometimes referred to as the Colorado River project?

A. It was on the Colorado River. I don't recall it being referred to as the Colorado River project, specifically.

13111 Q. I notice in Exhibit 1949 the heading on the letter is "Board of Reclamation, Denver, Colorado. Bids, February 10th, 1936, Hamilton Dam, Arnold Dam, Colorado River Project." Is that all one and the same or is it three different projects?

A. Well, I am not so sure about the Hamilton. I believe the Arnold Dam was a smaller dam a little further down the river, but built in conjunction with the Hamilton Dam, and I suppose the whole thing was referred to as the Colorado River project.

Q. What, briefly, was the difference between the old method and the new method of figuring the destination price or the destination cost at Beverley?

Mr. Hershberger: Well, now, I want to object. He is using terms "old method" and "new method", which I don't think have been defined. What is he talking about?

By Mr. Wooden:

Q. Well, as referred to in your calculations here, Exhibit 2267-A, B and C.

13112 Mr. Wooden: What the difference between the old method and the new method was.

A. The designation "old method" means the method that had been the method of figuring prices that had been—to government projects that had been used in Texas, as I said before, I think from the time the tax bill went into effect in Texas.

The expression or indication "new method" is a misnomer, in my opinion. It probably should have read "proposed method" or "considered method" rather than "new method," "new" indicating that it was something that had definitely been adopted, which is not the case and which the exhibit shows.

By Mr. Wooden:

Q. In other words, the old method was used after all?

A. The method that had been used for five years or so was used in the prices on that bid

Q. Do you know whether or not other bidders on that project used the old method?

13113 A. I do not.

Trial Examiner Norwood: Now, answer yes or no.

13114 A. No.

By Mr. Wooden:

Q. Do you know whether or not other bidders on that project bid the same destination price as your company?

A. I do.

A. I do.

By Mr. Wooden:

Q. What did they do?

A. My recollection is that they bid the same price, that the prices bid were the same, equal.

Q. Delivered at Beverley?

A. Yes.

Q. Would there have been some saving in the destination cost by using the new method?

A. Would there have been some saving?

Q. Yes.

Mr. Hershberger: Saving to whom, Mr. Wooden?

Mr. Wooden: Saving in the delivered cost to the government.

A. Yes.

By Mr. Wooden:

Q. That is indicated on Exhibit 2267-C?

13115 (Handing document to witness.)

A. Yes.

Q. Have you answered?

A. Yes.

Q. Did your company supply some of the cement for that project?

A. No, sir.

Q. None at all?

A. No, sir.

Q. Did some one company get it all or was it divided among a number?

A. I think one company was awarded all of it. That is my recollection.

Q. Do you know what company it was?

A. My recollection is that it was the Republic Company.

Q. Did they ship it all?

A. I don't know about that.
Q. Did you ship any of it?
A. No. We didn't have the order.
Q. Did Republic give you any part or transfer to you or assign to you any part of the order to ship?
A. Not to my knowledge.
Q. Can you tell us what the paper marked Commission's Exhibit 1950, for identification, is?
(Handing document to witness.)
13116 A. No, I never saw this thing until—
Q. Until when?
A. I never saw this thing until about a year ago.
Q. What were the circumstances under which you saw it then?
A. When Mr. Bouldin of the Texas Attorney General's office asked for a copy of it.
Q. It was a paper in the files of the Universal-Atlas Company, or, there was a paper in the files of the Universal-Atlas Company?
A. Yes.
Q. Of which this is a copy?
A. Yes, it was in the files.
Q. Do you know in whose handwriting it is?
A. No, I don't recognize the handwriting.
Q. Do you recognize anything about it as to the authorship?
A. The initials down in the corner—
13117 Q. What is the initial or initials in the lower left-hand corner?
A. I say I can't make them out definitely.

By Trial Examiner Norwood:

Q. Do you recognize what that is?
A. It looks like—
Q. J. C.?
A. J. C.
13118 Q. Do you recognize the mark?
A. No, I am not absolutely certain.

By Mr. Wooden:

Q. What is your best judgment?
A. My best judgment is that it is J. C.
A. I don't know. I would have to consult the list of—

13119 Q. Do you have a J. C. in your organization?

A. No.

Q. When that or a duplicate of that paper came to your attention a year or so ago, did you then make any effort to find out who J. C. was?

A. No, I just had the photostat made and gave it to Mr. Bouldin, is my recollection.

Q. Can you account for the presence of that paper, the paper of which that is a photograph, in the files of your company?

A. No, I cannot.

Q. Do you know any J. C. in the organization of any of your competitors?

13120 A. Of our competitors?

Q. Yes.

A. No.

Q. Did this paper ever come to your attention in the ordinary course of business and before the time that you supplied a copy to Mr. Bouldin?

A. No.

Q. Are the names that are on the lefthand margin or in the first column of the paper——do those include the names of your Texas competitors?

Mr. Zimmerman: The names of what?

Mr. Wooden: The Texas competitors.

A. Not all of them. A great many more companies than that do business in Texas.

By Mr. Wooden:

Q. Do they contain the names of the Texas companies who bid on the Hamilton Dam or the Colorado River project?

A. I think they do. As I recall those who bid—I don't remember each individual company that bid.

Mr. Wooden: I will offer that paper in evidence, your honor, Commission's Exhibit No. 1950.

13121 *Examination on Voir Dire by Mr. Leisure.*

13122 Q. Was any cement ever distributed according to this plan?

A. None that I know.

Trial Examiner Norwood: Was this plan ever adopted, Mr. Wooden?

Mr. Hershberger: I think it is obvious that it wasn't. He has testified that the Universal—

The Witness: One company got the entire order. We never got it.

By Mr. Wooden:

Q. Referring to these initials at the bottom of
13123 the page that you called "J. C.", could it be "C. J." instead of "J. C."? In other words, one is on top of the other, and I don't know which is on top.

A. No, I don't. I don't recall. We had a big office force at that time in the sales office, and it may have been—I couldn't say. I don't recall any "C. J." initials, either.

Q. In your organization?

A. Not in our organization.

Q. Do you know any "C. J." in any other organization?

A. No.

13124 Q. Were you aware, Mr. Scovel, of any proposal being considered at the time of those bids for dividing the business between the respective bidders on some percentage arrangement?

A. No.

Q. Or on any other kind of an arrangement?

A. No.

Q. I am showing you a paper marked as Commission's Exhibit 1948, for identification. Can you tell us what that paper is?

Q. Have you ever seen any paper before of which that is a photographic copy?

A. I have.

13125 Q. Where and when and under what circumstances?

A. In our file in our office.

Q. Your name appears on the paper somewhere, does it not, in the body of it?

A. It does.

Q. Did you receive the communication which that document purports to contain?

A. I think that I did. I think that I did.

By Mr. Wooden:

Q. Did you receive it or send it? Can you say about that?

A. No, I received it.

Q. What form of communication is that?

A. It looks like a teletypewriter.

Q. Can you say from whom the communication came?

A. From the Waco office.

13126 Mr. Wooden: Give these the next numbers, please.

(The photostatic paper writings referred to were marked "Commission's Exhibits 2268 to 2358", both inclusive, for identification.)

13127 Q. Mr. Scovel, I am showing you papers marked for identification as Exhibit 1942-A to E, inclusive. I think that was produced here by your Mr. Lindahl under subpoena. Have you seen that paper before or a duplicate of it?

A. I have.

By Mr. Wooden:

Q. Where and when, and under what circumstances?

A. I gave it to—I produced it to be submitted with the subpoena.

Q. You mean for Mr. Lindahl to bring here?

A. For Mr. Lindahl to bring here.

Q. Can you tell us what the paper is?

A. It is headed "A Method of Marketing, Texas."

Q. Whose document is it or who—how did it come into your possession in the first place?

A. I had it made up in our office on our multi-

13128 graph or mimeograph machine.

Q. For what purpose?

A. For the use of our people in connection with marketing cement in the state of Texas.

Q. When you say "our people", what people do you have in mind?

A. Any of our people, our salesmen, our office people in Texas and in other offices.

Q. Was it distributed among your sales force?

A. It was.

Q. Where did the thing come from from which you made your first mimeograph copy?

A. Well, after the sales policy dated July 26th, 1935, was issued—

Q. For your Texas sales?

A. In Texas, applying in Texas, I told our Waco sales manager to make up an analysis, a detailed statement of the sales policy and the method of selling that applied in Texas, that we had been following in Texas, which was—it wasn't anything new, it was just putting down in a con-

venient form for our men in the field, so that they could know how we wanted them to sell cement, in accordance with the practice in that state, and our sales policy that had been issued to the trade.

Q. Had you previously to the preparation of your Texas—

13129 A. I didn't get your question.

Q. Had you prior to the preparation of the paper that you have there, 1942, for use in Texas, adopted and used a similar statement in other sections?

A. Yes.

Q. Would you say it was the same?

A. The same as in Texas?

Q. Yes.

A. No, the policies are different; therefore, the method of marketing is different.

Q. Will you say in what respects the Texas sales policy differed from that elsewhere?

A. Well, the simplest way would be to put them side by side and the differences show themselves.

Q. Do you have a recollection of what any differences were?

A. Well, I think my recollection on the Texas policy is that the Texas policy contains a provision that State highway work, that highway work will be sold direct if more than 50 per cent of it lies outside the limits of a town, city or village. That is one difference.

Q. In other words, the manufacturer gets a larger share of that business in Texas than elsewhere?

A. No, he gets a smaller share.

Q. A smaller share. I just wanted to straighten that out.

13130 A. Because in the other policy it provides that lying wholly or in part outside of a city, town or village, will be sold direct. That was in the printed policies.

Q. Showing you a paper marked, for identification, as Exhibit 1905-A to F, inclusive, would you say that is the same statement of sales policy that Universal had used in other sections than Texas and prior to the time it sent out the one for Texas?

A. Well, I don't know. I would want to compare this one with the one we are using in the other parts of the territory before I would say. This is quite a detailed five-page document.

Q. Do you mean that you are now using a statement of sales policy in sections other than Texas of somewhat a similar form?

A. Yes.

Q. Will you produce here a copy of that form that your company is using in other sections than Texas?

A. Yes.

Q. All right. Can you say who, if any one, in your organization, prepared the statement of sales policy used in sections other than in Texas?

A. Maybe I didn't get the question. Read that again, will you, please?

(Question read.)

13131 A. Yes.

Q. Who?

A. I did.

Q. All right, will you bring one of those in?

A. I will.

Q. This afternoon?

A. That is what you asked me for before.

Q. Yes.

A. Yes.

Q. I also wanted to find out who prepared it. If you prepared it, can you state from what sources you prepared it?

A. It was prepared from—

A. They are two different documents.

By Mr. Wooden:

Q. Yes, the statement of sales policy was a circular addressed to the trade?

13132 A. Sent out to the trade.

Q. This other is for your own sales force and staff?

A. That is right.

Q. Can you state from what sources you prepared the method of marketing applicable in sections other than in Texas?

A. It was prepared from several sources of information. It wasn't anything that occurred all of a sudden. It was from my knowledge of the business and the practices that had been employed in selling cement over a period of years. It was Section 11 in the Code, whichever was used, and I believe some of the announcements to the trade. Cer-

tainly, the announcement to the trade that we sent out on April 9th, which was a month and a half or so before this policy, this method of marketing was prepared—

Q. In Texas?

A. No, not in Texas. You are asking me about the one other than in Texas.

Q. Yes.

By Trial Examiner Norwood:

Q. Were some of the announcements by other companies and by the Institute?

A. No.

Mr. Zimmerman: If the Examiner please, there was never an announcement by the Institute.

Trial Examiner Norwood: I am asking him if
13133 there was.

The Witness: No.

By Trial Examiner Norwood:

Q. Announcements by whom?

A. Our own published sales policy sent to the trade.

Q. I see.

A. Ever since Section 11—when Section 11 was taken out of the Code, there was a great deal of work being done in revising Section 11, and to get a Section 11, or something similar to that put back into the Code. It is pretty hard to sell cement if you don't have some sort of a statement of policy, a method of marketing, whether it is in a shape like that, or something else. Within a week after Section 11 was taken out of the Code, our files in the office show that there was a statement set down with regard to how we were going to sell our cement.

Q. That was—

A. That was after January 30th, 1934, within a week or so after General Johnson took Section 11 out of the Code.

Q. But in 1935 it was the fact, was it not, that you somewhat enlarged the classes of business that the dealers would handle after dealers made representations to you that it should be done?

A. Well, I think that is possible. I don't recall now just the variations of the different sales policies that
13134 were in effect from, oh, even before the Code, even public announcements that we had sent out as early as 1931; I don't recall all of those differences. It is pretty

hard to analyze a thing like that, unless you lay them down side by side and do it.

Q. Was there a time when Universal-Atlas sold Emergency Relief jobs direct?

A. Well, I don't recall definitely. Possibly it might have been so when the thing was brand new and just come into existence. That is not impossible, that it was done.

Q. Don't you recall whether it did or not?

A. Well, I don't handle any direct sales to Emergency Relief work. Our offices handle those, and I would say they are in a better position to say than I am.

Q. You don't really know?

A. I don't really recollect.

13135 Mr. Wooden: I believe there is an offer pending of Commission's Exhibit 1948.

Trial Examiner Norwood: Any objection?

Mr. Leisure: May I ask the witness a question about it?

Trial Examiner Norwood: Certainly.

The Witness: I don't recognize—

Trial Examiner Norwood: Wait a minute. Wait until he asks you the question.

Examination on Voir Dire by Mr. Leisure.

Q. You notice that has some printing up in the lefthand corner. It has "Chicago" on it, and then below it has a different city.

A. You mean the difference between this and this (indicating)?

Q. Yes. I am trying to find out what it is. Did you have anything to do with that document?

A. Why, I have a very faint recollection of having seen it before, or possibly at the time it came in. It apparently is a teletypewriter message to our office from the Waco office.

Q. Do you know anything about it, what it is? Did it come to your attention at the time so that you have any present knowledge concerning it?

13136 A. Well, I have a recollection of what it was.

Q. Do you think—

A. My best recollection is that I asked the Waco office for this information, probably asked them for the information; otherwise, I don't think that they would voluntarily have given it to me. There would be no call for that.

Q. Did you use it any way? What is it?

A. Well, my recollection is that it was some information in connection with a questionnaire that was prepared in our office on which I did some of the work.

Mr. Hershberger: You are referring to the Burns—

By Mr. Leisure:

Q. What questionnaire?

A. The Burns and Clark, I think it is familiarly referred to, Professor Burns and Professor Clark.

Q. This represents the information you got for that purpose?

A. This represents my recollection, that this represents information that I had asked the Waco office for in connection probably with something—

Mr. Leisure: Well, if that is what it is, we object to it, your honor, as being under the head of work sheets of the Burns and Clark material.

Trial Examiner Norwood: Any further objections?

Mr. Hershberger: Of course, I want to state the
13137 general objection that I can't see how asking for information pertaining to Professor Burns and Professor Clark would have anything to do with conspiracy in this case. In other words, it is immaterial, irrelevant, in our opinion.

(COM. EX. 1948 was offered and received in evidence.)

Direct Examination (resumed) by Mr. Wooden.

Q. Mr. Scovel, showing you a paper marked as Exhibit 2268, for identification, I am calling your attention to handwriting and figures that are on there. Is that handwriting the handwriting of someone in the Universal-Atlas organization that you recognize? Whose handwriting is it?

A. There is nothing familiar about that handwriting to me whatever.

Q. Showing you Exhibit 2269, for identification, what is your answer to the same question regarding the handwriting and figures on that paper?

A. I can't identify any of that handwriting.

Q. And Exhibit 2270?

13138 A. There is two different kinds of handwriting on there.

Q. You can't identify either of them?

A. I can't identify either set.

Q. Exhibit 2270, the handwriting on that. Can you identify that as the handwriting of anyone in your organization?

A. I can't identify that.

Q. Exhibit 2279, is that handwriting on there anything that you can identify?

A. I can't.

Q. Exhibit 2280, the handwriting in the lower lefthand corner. Can you identify that?

A. No, sir.

Q. Is the same true of the handwriting on Exhibit 2282, for identification?

A. I can't identify it.

Q. Will you look through the papers marked as Exhibits 2283 to 2320, and, if you can, identify any of the handwriting on any of those papers.

(The witness examines the exhibits referred to)

Q. Now, you have examined all of these papers. Will you state which ones you can recognize and identify the handwriting on, giving the number designations?

A. On Nos. 2298, 2300, 2303, 2312, 2317, 2318, 2320, I would identify the letters signed with the initial "T" as having been put there by the person that wrote this letter.

13139 Q. Who was that?

A. Mr. L. B. Thomas.

Q. Who is he?

A. Well, he was in our Indiana sales division at one time, I presume at the time he was in the Chicago office.

Mr. Leisure: Is that Exhibit 2320 the witness is now referring to?

Trial Examiner Norwood: Is that right?

The Witness: Well,—

Mr. Wooden: There is a number of them, I guess, six or seven of them.

Mr. Leisure: Well, all of those?

The Witness: Yes, they are all the same.

A. And 2299, the initials are written which I recognize to be those of Mr. Cronkrite.

By Mr. Wooden:

Q. Who is he?

A. Vice president.

Q. Of Universal-Atlas?

A. Yes, sir.

Q. Did you note upon those various numbered papers that you have examined a number of calculations in typewritten form?

A. I did.

13140 Q. Was it customary in your office to make such calculations on quotations, circular announcements of quotations, that were picked up in the field, announcements of other companies?

A. Unless they came into our office from an outside office with those calculations already on them.

Q. Well, w it customary to work out such calculations in your office after they came in?

A. Not if they were already there.

Q. No, I suppose not, but were they worked out sometimes when they were not there?

A. Well, I presume there might be checks by someone, but I don't think it was a regular custom. I didn't have anything to do with that end of it.

Q. Now, will you look at papers I show you, marked for identification, 2331 up through 2358, and answer the same question regarding identification of any handwritten notes that appear thereon, so far as you can identify the handwriting.

(Handing documents to witness.)

Trial Examiner Norwood: This is off the record.

(A discussion ensued off the record.)

A. Shall I ask her to make a note of it?

By Mr. Wooden:

Q. Yes, just ask her to make an informal note of it.

13141 A. Yes, these are all clipped together; 2338 and 2341.

Now, what were the numbers?

(Answer read.)

A. Well, there is only one of them I can identify, 2341; that is the only one, 2341.

By Trial Examiner Norwood:

Q. Do you recognize the writing on that?

A. I would identify that.

Q. You recognize it as what?

A. I recognize it as also the initials of L. B. Thomas, as he writes it, to my best knowledge.

By Mr. Wooden:

Q. You had some others, didn't you?

A. No, I have no others.

Q. I thought there were three.

A. No, I only had two. I can't identify the other one.

Q. You can't identify the initial "G" and handwriting on 2340?

13142 A. No, I cannot.

Q. Are you familiar, Mr. Scovel, with the method by which the Chicago delivered price is calculated?

A. No, I couldn't tell you right now what it is even. I have nothing to do with that.

Q. All right. Is it based on Buffington, do you know that?

A. I presume it is.

Q. But you don't know?

A. I don't know definitely.

13143 *Cross-Examination by Mr. Hershberger.*

Q. Mr. Scovel, you testified on direct about Exhibits 2267-A to C, did you not?

A. Yes, sir.

Q. Just what are those documents?

A. These were documents that were made up in connection with bids on the Hamilton Dam.

Q. Who made them?

A. I did.

Q. And when were they made?

A. They were made February 4, 1936.

Q. Was that prior to the bid on the Hamilton Dam invitation?

A. Yes.

Q. Or after?

A. No, that was prior to it.

Q. What was your occasion for making up those documents, Exhibits Nos. 2267-A to C?

A. Well, there had been some—one purpose was to show what the delivered price at Beverly—prices at Beverly, and the destination costs for Beverly would be using the method that had been in effect for several years, that had been practiced for several years there in connection with the use of the Texas tax, and that comparison to—that

statement be compared with the method eliminating
13144 the use of the tax.

Q. Did you prepare the Universal-Atlas Cement Company bid in connection with the Hamilton Dam?

A. Yes, I did.

Q. And was the reduction of those documents to writing an attempt on your part to determine what figures you should put in your bid?

A. That is correct.

Q. Do you remember whether the invitation called for bids to be made F. O. B. delivered, or F. O. B. mill?

A. It called for bids both ways.

Q. In other words, it called for bids to be made F. O. B. destination, and F. O. B. point of shipment at the option of the bidder; is that correct?

A. Yes.

Q. Now, when you put down on the top of Exhibit—is 2267-A the first sheet?

A. That is the top sheet.

Q. When you put down there at the top "destination price F. O. B. cars, Beverly, Texas", was that a designation intended to show what your delivered price, F. O. B. delivered price was to be?

A. That indicated, yes, the result of that computation was to be the delivered price in cloth or in bulk F. O. B.
cars, Beverly, Texas, under this method that had
13145 been in use for many years.

Q. In other words, you intended by this to set down on paper the delivered destination price that you would bid under the one method that was called for in the invitation; is that correct?

A. That is correct.

Mr. Wooden: One of the methods.

Mr. Hershberger: Under one of the methods.

By Mr. Hershberger:

Q. And as a matter of fact, lower down in the exhibit where you show destination cost for Beverly, Texas, that was your effort to put down in writing on this exhibit your F. O. B. mill price at your mill, was it not, F. O. B. Mill price at your mill by means of the use of what you call a destination cost bid?

A. Destination cost, yes.

Q. Yes.

A. That was the make-up of destination cost to be named in the bid for cloth and bulk.

Q. So then you intended to bid on this invitation for Hamilton Dam in two ways, two alternative ways, one being an F. O. B. destination price, and the other being a destination cost bid with the so-called control clause?

A. That is right.

Q. From which the Government could determine
13146 what its F. O. B. mill price should be, is that correct?

A. That is correct.

Q. Now, going back to your first designation of the destination price, at the left, under the word "cloth" you have some figures. Will you please explain those? What is the $1.75?

A. $1.75 is the price based at Atco without the tax.

Q. And what is the next, the 5 cent tax mark?

A. The 5 cent tax represents the amount included in prices customarily in Texas for the state tax.

Q. Now, what is the "65 comcl frt"? What does that mean?

A. That is the commercial freight per barrel or—

Q. From where to where?

A. From our mill at Atco to Beverly, Texas.

Q. Where did you get that figure of 65 cents that you wrote down?

A. That figure was produced by multiplying the per hundredweight—it was produced by taking—it was produced from our Texas freight rate book.

Q. In other words, your company had at that time a Texas freight rate book from which you found this amount of 65 cents shown as the freight rate for commercial shipments from Atco to Beverly, Texas; is that correct?

A. That is correct.

Q. Now, this freight rate book that you are talk-
13147 ing about was not the freight rate book of The Cement Institute, was it?

A. No.

Q. It was a freight rate book prepared by your own company?

A. Yes, sir.

Q. And at the time in question, February, 1936, did you use the freight rate books of The Cement Institute?

A. No, we did not.

Q. You used your own books prepared by your own company?

A. Yes.

13149 Q. Mr. Scovel, before lunch we were talking about Exhibit 2267-A, B and C, and you were telling me about the items appearing in the upper lefthand corner of 2267-A. I think you testified that the 65 cents shown was freight which you had taken from the Universal-Atlas freight rate book. Now, will you tell us whether that was the applicable freight rate from Atco, Texas, to Beverly?

A. It was not the exact, actual commercial freight rate.

Q. Just tell us what it was.

A. It was the freight rate arrived at in a method that has been used in the cement business ever since I have been connected with it. It was a multiplication of the per hundredweight freight rate of 17 cents a hundred by 380 pounds, the weight of a barrel of cement in package, which resulted in a fraction that was over a half, and as I say, as long as I have been in the cement business it

13150 has been customary in determining rates used in figuring destination prices to make an adjustment when the actual price was more than one-half cent, one-half cent or more, the freight rate was considered as the next highest even cent, and when it was .4 cents, the fraction was .4 or less, the next lowest cent was the freight rate.

Q. Have you that exhibit in front of you that we were talking about?

A. No, I haven't.

Q. I would like to have you hold it while I am questioning you. Here it is.

(Handing document to witness.)

Q. Can you see on that exhibit whether in any of your computations the exact freight rate per barrel from Atco to Beverly, cloth, is shown?

A. Yes, it shows in the computation of the destination cost.

Q. And what is the actual freight rate?

A. 64.6 cents.

Q. So what you mean to say is, with reference to the destination price shown in the upper lefthand corner of the page, that instead of using the actual rate of 64.6 cents you raised it to 65 cents per barrel?

A. That is correct.

Q. Now, what is the next item of 40 cents?

13151 A. That represents the cost of cloth sacks.

Q. And you added the figures together and get

$2.85, from which the exhibit indicates you deduct 4.7 cents, is that right?

A. That is correct.

Q. And what is the deduction of 4.7 cents?

A. That represents the actual Texas State cement tax.

Q. Per what, barrel?

A. Per barrel, and that is computed by multiplying 1¼ cents per hundred, which is the actual tax, times 376 pounds, which is the actual weight of cement in a barrel.

Q. Well, you mean by multiplying the rate per hundred, you mean by 3.76?

A. 3.76.

Q. Yes. Now, why did you add 5 cents as your second figure in that computation, and then deduct 4.7 cents at the end?

A. Because that had been the custom for a number of years, the practice that we had followed, and we had—

Q. Had you made many sales in Texas in which you followed that practice?

A. All sales in Texas, all the sales with the taxes, on the first intrastate sale in Texas and on all such sales we had followed that practice.

Q. And you deduct the actual tax because there
13152 is no tax on sales to the government, is that correct?

A. That is correct.

Q. Now, turn to the right, upper righthand corner of the page and you see under the title, under the word "bulk" some figures, the first reading 2.803 destination price, cloth, and from that apparently you deducted 45 cents for bulk, so your exhibit reads.

Now, why was that done?

A. That was done because of the fact that it had been a practice of ours for, I think since sometime in 1932, that when a quotation was made on a delivered basis for cement in bulk, we deducted 45 cents from the destination price in cloth.

13153 Q. You had followed that in numerous instances, had you?

A. Yes.

Q. What is that 45 cents built up of, can you tell that?

A. That is built up of the cost of cloth sacks.

Q. How much?

A. 40 cents, plus 5 cents for lesser cost of handling bulk cement.

Q. So that, then, by the computation in these first two columns that we have been discussing, you arrived at a destination price for cloth cement of $2.803, and for bulk a destination price of $2.353 per barrel; is that right?

A. That is right.

Q. And those are the figures which you quoted in your bid?

A. Yes, sir.

Q. Now, take the lower half of the page, Exhibit 2267-A, under the heading "destination cost for Beverly, Texas." Now, will you explain how the column at the left was made up?

A. The first figure, $1.75 at Atco—

Q. Is what?

A. Is the mill base price at Atco.

Q. By the way, Atco is your mill, is it not?

A. That is the shipping point of our mill.

5 cents represents the Texas state tax, and .646 13154 is the actual commercial freight on 380 pounds to the barrel. That is the weight of the barrel in packages.

Q. In cloth?

A. In cloth.

Q. Go ahead. What is the next item?

A. 40 cents represents the cost of the cloth sacks. That totals 2.846. From that is deducted .047, the actual Texas state tax, making the—

Q. That gives you a destination cost as shown of 2.799 dollars per barrel?

A. That is right.

Q. Now, why in that instance did you use the actual freight instead of the, we will call it, adjusted freight, which you used in computing the destination price about which I asked you a moment ago?

A. That actual freight was used because it had been a practice which we had followed, and others, from the time in computing destination costs for Government bids, since the time the destination costs, so-called control clause, had been used back in the early part of 1934.

Q. That is, during the NRA Code period?

A. That was during the NRA Code period. In fact, there have been some letters from the Code Authority that referred to the matter of actual commercial freights in connection with destination costs.

13155 Q. Well, would you say that you had had information of actual filed prices with the Code Authority which indicated that the actual freight rate rather than adjusted freight, as I termed it, was being used when destination cost bids were submitted?

A. Yes; I would say yes, although I don't know that I can recall any particular instance right now, that is, name any definite bid.

Mr. MacIntyre: If your honor please, we would like to ask Mr. Hershberger at this point to make it clear whether he is talking about a calculation of prices by this witness during 1934 or during 1936, as we understood the calculation to have been made up.

Trial Examiner Norwood: I think he can make that clear.

By Mr. Hershberger:

Q. The compilation that we are discussing, that is, the Exhibit 2267-A, I believe you testified this morning was made on or about the time that it is dated, February 4th, 1936; is that correct?

A. That is true.

Q. Now, the question that I just asked you as to whether you had known of actual bids filed with the Code Authority, prices filed with the Code Authority in which actual freight rather than adjusted freight was used in

13156 making destination cost bids, obviously, although I didn't say it in my question, it refers to the time that the Code was in effect. You, as I understand it, testified that you did have information of such bids filed; is that correct?

A. Yes.

Q. That was—

A. Prices filed, costs filed with the Code Authority.

Q. And as a matter of fact, since that time have you been familiar with bids that had been submitted in various parts of the country where destination costs had used the actual freight rather than the adjusted freight?

A. Yes, sir.

Q. It had become a common practice, had it not?

A. Yes.

Trial Examiner Norwood: What do you mean by "adjusted freight"?

The Witness: If you multiply, for instance, 20 cents a

hundred times 3.8, it gives you a figure of 76. In other words, 76 cents a barrel freight. There is no adjustment to be made. There is only one figure you can get. But if you multiply 17 cents a hundredweight times 380 pounds, you arrive at a figure of 64.6 cents a barrel, and instead of quoting a price using that as the freight rate as a factor,

13157 it has been customary ever since I have been in the cement business to adjust the figure. If it is five-tenths of a fraction, five-tenths of a cent or more above, then the next even cent is considered. The freight rate in this instance would be 65 cents instead of 64.6.

Trial Examiner Norwood: I get it.

The Witness: Is that clear? If it is four-tenths or less, it is the lower figure.

Trial Examiner Norwood: Go ahead.

By Mr. Hershberger:

Q. Now, turning to the column of figures in the lower right corner of Exhibit 2267-A, under the word "bulk" explain what that column of figures is or represents.

A. The $1.70 figure represents the mill price base at Atco for shipment in bulk.

Q. That is 5 cents less than—

A. Which is 5 cents less than for shipments in cloth.

Q. Go on.

A. The next figure, 5 cents, represents the state tax, Texas state tax, and the next figure—

Q. .6392?

A. .6392 is the freight rate per barrel computed from the 17 cents per hundredweight rate between Atco and Beverly, using a weight of 376 pounds, which is the weight of a barrel of bulk cement.

13158 Q. In other words, you mean that you would multiply 17 by 3.76?

A. 3.76.

Q. That gives you—

A. .6392 per barrel.

Q. Now, under that you have a line drawn, a short line. What does that mean?

A. That means that there is nothing involved for the cost of package, because there was none.

Q. Then you add those figures up and deduct .047. That is that for?

A. That .047 represents the Texas state cement tax.

Q. So that leaves you a result of $2.3422 per barrel, destination cost in bulk?

A. That is correct.

Q. Now, is that the figure that you put in your bid?

A. That is my recollection, yes, sir.

Q. And you also for cloth bid the destination cost of $2.799?

A. Yes.

Q. Now, why did you use 63.92 cents in this destination cost for bulk cement instead of an adjusted figure?

A. Because through prices filed with the Code Authority, as far back as my recollection goes, and the first one I can recollect is in connection with some bids at Fort
13159 Peck, where a price was filed indicating the use of the actual freight rate on bulk, the weight of bulk cement.

Q. In other words, whenever a destination cost bid was made, whether it be bulk or cloth, it had come to be the practice of quoting actual freight rates rather than what we call adjusted freight rates, where you were quoting delivered prices?

A. That is true. That was also a matter of practice and experience.

Q. Now, turn to Exhibit 2267-B, and I see you have made computations on that page, first under the heading "destination price" at the top of the page, and then "destination cost" on the lower half of the page, which seem to be substantially in the same arrangement as those computations on Exhibit 2267-A, except that in each instance there is no item in it for tax. Is that the only difference?

A. Yes, that is the only difference between them.

Q. In other words, you didn't add in the 5 cents and then deduct the 4.7 cents?

A. The tax is ignored entirely in this one.

Q. And up at the top of the page you have marked "new method." Is that in your handwriting?

A. It is.

Q. And did you make this Exhibit 2267-B about February 4, 1936?

13160 A. I did.

Q. Why did you make it?

A. There had been some discussion. I don't recall what started it. But there had been some discussion in our office with regards to—involving the question of whether

or not the tax should be left off entirely on quotations to the United States Government.

13161 Q. Had you ever made any bids in Texas to the United States Government up to that time, in which you had left it off, left the tax off entirely, given it no consideration in making the bid?

A. To the best of my knowledge, we never had left off the tax.

Q. But you were giving some consideration as to whether you wanted to do it?

A. That is true.

Q. And this bid was made on that basis and it produced a lower figure in each instance by the amount of .3 of 1 cent per barrel, did it not?

A. That is using this so-called new method produced—would produce a lower price and cost of .3 of a cent.

Q. Per barrel?

A. Per barrel.

Q. Now, when you used the words "new method", you did not mean to indicate it was a method you had been following necessarily?

A. I stated this morning it was a misnomer to call it a new method, that it more properly should have been called "discussed method" or "possible method", anything to indicate that it was not something that had actually been put into practice.

13162 Q. Exhibit 2267-C is merely an explanation, is it not of the differences between the bid which you made and the type of bid which you were considering with a possible view of making it, under the second page, is it not?

A. Yes, it is a comparison of it.

Q. Now, you were shown an exhibit this morning in connection with this bid—1949, I believe, is the one I would like to have—will you look at that exhibit, and you remember receiving that, do you, or seeing it about the time it came in?

(Handing document to witness.)

A. Well, as I said this morning, there is nothing here to indicate that I did see it. I may have myself scratched, made that pencilled line there, but—

Q. Well, is the subject matter of that letter, Exhibit 1949, the proposed bid to be made on the Hamilton Dam or not?

A. It is.

Q. It relates to the very subject matter that is covered by Exhibits 2267-A to C, does it?

A. Yes.

Q. And it has to do with the possible bidding of what you would call the new method on Exhibit 2267-B, does it not?

A. Yes.

Q. After you had made up Exhibit 2267-A to C, did you have some discussion in your office as to which way
13163 the bids should be made?

A. Yes.

Q. And what conclusion was arrived at?

A. To bid according to the practice that we had been following for a number of years there, and which is the method shown on 2267-A, the old method.

Q. And you made a bid in that manner?

A. Yes, sir.

Q. Did you get any part of the contract for which you bid?

A. No, sir.

Q. You did not sell any of the cement?

A. No, sir.

13165 Q. Let me ask you one other question, Mr. Scovel, about this Hamilton Dam bid. When you prepared this exhibit, 2267-A, B and C, did you discuss them with any of your competitors?

A. No, sir, I did not.

Q. Did you at any time before or after discuss with any of your competitors the bid which you made on the Hamilton Dam?

A. No.

Q. You never furnished your competitors with the statement of what you were going to bid on the Hamilton Dam, did you?

A. No, sir.

Q. You had no discussion with any of your competitors at all regarding your bid?

A. No, sir.

13166 Mr. McPherson: If the Examiner please, as counsel for the Trinity Company, I would like to ask Mr. Scovel one or two questions.

Trial Examiner Norwood: All right.

By Mr. McPherson:

Q. About that document entitled "Fair distribution of the Colorado River project" the Trinity Company was mentioned as one of the companies to participate.

Mr. Wooden: That is 1950, for identification.

By Mr. McPherson:

Q. Well, it is 1950, for identification. Now, did you get my question?

A. That you believe the Trinity Company was mentioned as one of those.

Q. Was it?

A. Well, I don't recall all the names on there.

13167 (The document referred to was handed to the witness.)

A. (Continuing) The Trinity Company is listed on here as one of the names that shows in the column here.

Q. Now, Mr. Scovel, as a matter of fact there were two lettings of cement on the Colorado River project, were there not?

A. I don't recall a second one.

Q. You don't recall a second one?

A. I don't recall one after this February 10th.

Q. In the first letting—

A. (Continuing) Not of the Hamilton Dam.

Q. In the first letting the Trinity Company received no part of the bid, did it?

A. No, my recollection is that it all went to the Republic Company, which I believe I testified to this morning.

Q. And you don't know anything about there being a second letting?

A. No, I don't recall it.

Mr. McPherson: That is all.

Trial Examiner Norwood: Any further cross-examination? Any further questions—any redirect?

Redirect Examination by Mr. Wooden.

Q. Mr. Scovel, as far as you know, was any allow-
13168 ance made or credit given to Universal by any other bidder for a portion of that business on the Hamilton Dam letting?

A. There was not.

Q. Now, referring to this bulk differential of 5 cents

which you mentioned, did you say that was established sometime in 1932?

A. I said that the practice of quoting 45 cents less in bulk F. O. B. destination had been in effect—than the price in cloth at the same destination had been in effect since, my recollection is; sometime in 1932.

Q. Didn't that constitute a 5 cent differential on the stripped price, 5 cents below the stripped price of cloth?

A. Well—

Q. In other words, 40 cents off for sacks, and 45 cents off for bulk, isn't that right?

A. That is right; 45 cents off for bulk and 40 cents for sacks.

Q. A 5 cent differential in delivery between cloth and bulk?

A. I suppose you can refer to it with that designation.

Q. Prior to that change had there not been a difference of 10 cents between the stripped price of bulk and cloth delivery?

A. I think that is the fact. There had been several different—

13169 Q. Was that change from 10 cents to 5 cents made generally about that time?

A. Well, my recollection is that we picked up quotations in the field that reflected that change from the former way, 50 cents to 45 cents.

Q. And you thereupon adopted it yourself, is that correct?

A. That is true.

Q. That amounted to an increase of 5 cents a barrel in price, didn't it?

A. Well, not necessarily.

Q. When you sold in bulk?

A. The mill base price—the mill price base had been, if today the price was $1.00 at destination and 10 cents off for bulk and tomorrow it was still $1.00, yes.

Q. Yes, just taking the differential alone and assuming that the base price itself would not change?

A. Yes. You can figure it out.

Q. Now, with regard to the adjustment of fractions in figuring the freight rates that Mr. Hershberger asked you about, you could not make any adjustment of those fractions when it came to a matter of paying your freight bills or in connection with your figuring of the freight itself, could you?

A. I don't know that I understand just what you mean.

Q. Well, I will put it this way: Didn't you
13170 make the adjustment of the fractions for purposes of determining your delivered prices as distinguished from the figuring of your freight?

A. Well, the practice was there when I came into the cement business. I don't know that.

By Trial Examiner Norwood:

Q. Did you pay your actual freight in the same manner as you made the freight estimate in figuring fractions, dropped the fractions, and so forth?

A. Figuring freight?

Q. Actual freight, yes.

A. I don't quite get what he is after and what he understood.

By Mr. Wooden:

Q. Well, if the actual freight came out, was a fraction, which when applied to the weight of a barrel of cement gave you another fraction, that was the actual charge that somebody had to pay the railroad company, wasn't it?

A. Yes, the customer that received the material would pay that.

Q. In other words, there wasn't any adjustment of the fractions in connection with the actual railroad freight, was there, as distinguished between your adjustment of the fractions for figuring your delivered price?

A. No, the freight is paid as actually rendered
13171 by the railroad bill.

Q. Including the fractional figure to start with?

A. Well, whatever it figures out, so much per hundred pounds, the weight per barrel.

Q. But in figuring your delivered prices you made adjustments—

A. As explained.

Q. —as explained and which you could not make when you figured the actual freight?

A. I suppose that could be made, but I don't think it would affect the payment of the amount of freight that would be made.

13172 Q. Do I understand that in figuring the bid for this Hamilton Dam, that you used the filed price of
1934 under the Code?

A. No, we figured it from our freight rate book.

Q. Well, you said something about the prices having been filed in 1934.

A. Not for this job.

Q. Oh.

A. I wasn't referring to prices for this job.

Q. What was the connection between the prices filed in 1934 under the Code and your testimony about it?

A. Simply that the prices filed under the Code, from those prices would indicate what was being—what the practice was as to the make-up of the prices, because the freight rates are available and you can analyze those.

Q. You are making the point that the method was that followed under the Code but not the actual price filed under the Code; is that right?

A. That is true.

Q. And you were continuing to use the method?

A. That is right.

Q. That applied under the Code in 1936?

A. And we had used—

Q. Was there anything provided for under the Code by interpretation or otherwise regarding the method 13173 of figuring the state sales tax?

A. Well, I don't think the state sales tax—it wasn't mentioned in the Code itself, but there was a—there was a filing, a filing had been made under which quotations to the Government could be made at 4.7 cents, direct quotation to the Government could be made at 4.7 cents per barrel less than the commercial destination prices on file with the Code Authority.

Q. Had you filed a price involving that method of applying the state sales tax?

A. My recollection is that we met that filing.

Q. By a filing of your own, you mean?

A. That is what I mean. That was the customary way of doing it.

Q. As I understand it, instead of deducting 4.7 cents there was a net addition of 3 tenths of a cent: is that correct?

A. No. The custom had prevailed down there, as I said, of figuring the tax at 5 cents, 5 cents a barrel, and when the deduction was made, it was made at 4.7 cents, the actual—

Q. Did this apply to commercial business as well as sales to Government, that method?

A. Well, no. It was the method of adding but not the method of deducting. Tax is included on commercial business. There is no deduction made on commercial sales.

Q. You were asked to bring in the method of
13174 marketing cement that you described in your testimony this morning.

A. Mr. Hershberger has it.

Q. Are the papers marked 2259-A to F, inclusive, for identification, the paper which you said this morning you would produce this afternoon?

A. Yes, sir.

Q. And which you described as having been used by your sales force, distributed among your sales force?

A. Yes, sir.

Q. That represents instructions to your sales force that they are using in their current activities?

A. Well, there may be some practices that have
13175 been established in different parts of the country that are not exactly the same as that, but in general—generally speaking, it is. That is the method of marketing which we are following at the present outside of—

Q. In sections other than Texas?

A. Not in Texas, no.

Q. You have a special method of marketing cement outlines in Texas?

A. Yes.

Q. As I understand it, you made up this statement, which is marked 2359-A to F, inclusive?

A. Well, I set up the lay-out, and divided the lay-out or made up the lay-out which, as I say, was an analysis of the method of marketing. The practice has been in effect for a long time.

Q. Is the language of the statement of your composition?

A. Well, not entirely, no.

Q. Can you state—

A. I had suggestions from—I had suggestions from people in our office with regard to this.

Q. Will you state who in your organization assisted you or made any suggestions regarding the contents of that paper?

A. Well, I don't know. The thing was discussed around

with people in the office here, and we may have even had some suggestions in from outside offices.

13176 Q. I was going to ask you whether you had any suggestions submitted, or if you considered any suggestions from other cement companies.

A. Branch offices probably did send in some suggestions, because this thing was sent out to them.

Q. Did you have any suggestions from competitive cement companies about it?

A. No, I think with regard to this, this is the final proof that was—or final copy that we sent out to our people, but I don't recall—this thing has been in use since—since this thing has been in use I haven't had any suggestions of any kind. There have been changes, as I say, in it, but—

Q. I am speaking now of its original compilation and preparation, whether you had suggestions from other cement companies regarding it.

A. Well, I don't know. We may have discussed it at times, when I bumped into somebody, but there is nothing formal about it, nothing of a formal nature of the discussion of it.

Q. Did you have some informal discussion?

A. Well, I think there was some.

Q. With whom?

A. Well, I think that there was some discussion, informal groups that discussed this here in Chicago.

13177 Q. Who were in the group you refer to?

A. Well, the group that I refer to, my recollection is that—I think Mr. Rohwer was there, and I think that a man from the east, I think his name is Bragg—

Q. Who was he?

A. I don't recollect what company. I think it is the Alpha Company. I am not sure. And I think Mr. Calvin was there.

Q. Is that Ben Calvin?

A. Yes.

Q. Was he then connected with the Consolidated Company?

A. I think so. I don't recall just how recently he left them.

Q. All right. Who else?

A. I don't recall anybody else.

Q. Was Mr. Rader present?

A. I don't recall him.

Q. Was anybody else present from the Lehigh Company?

A. I don't recall anyone else there.

Q. Was Mr. Fellows of the Alpha Company present?

A. I don't recall or have any picture of anyone other in my mind than those that I have mentioned.

13178 Q. Was Mr. George Reiter present?

A. No, not that I recollect.

Q. Were any representatives of dealers present at this group that you refer to?

A. No.

Q. Was it understood that you would prepare a statement of the matters that you discussed at that group gathering?

A. Why, I don't know that it was—I don't recall whether there was any definite understanding that I would do it, but I think I did do it.

Q. And is that paper that you hold in your hand, Exhibit 2359-A to F, inclusive,—is that the result or does that embody what you did after having that discussion with that group?

A. Well, I don't know about every individual item.

Q. Well, whether every individual item or not, what is your answer with any qualification you want to make?

A. I would say that some of it is.

Q. Did you have help from any others in that group in the preparation of the statement?

A. No.

Q. Did you submit the results of your labors to others in the group?

A. Well, my recollection is that they got some copies of this.

13179 Q. Who got some copies?

A. Those that were in the group. We may have sent some of them to some of the companies right in Chicago. There is no secret about it, the lay-out of this thing, because it was—

Q. Who sent the copies to some of the companies in Chicago?

A. Why, I don't know. I may have sent some; some of our other people—some of our branch offices may have sent some of those out.

Q. Was there anything of that character such as repre-

sented by Exhibit 2359-A to F, inclusive, that was in circulation prior to the date indicated on 2359-F, namely, May 28, 1935?

A. Prior to this?

Q. Yes.

A. Well, I think there was an earlier draft of this thing. There was an earlier draft of this—

Q. Did you prepare the earlier draft?

A. Not this final draft.

Q. Did you prepare the earlier draft?

A. Yes, I prepared the earlier draft.

Q. And did you submit that earlier draft to the consideration of these other people that you have—

A. That is the one I mean. This is the final—this is the final thing that we prepared.

13180 Q. When you say "we"—

A. Well, I mean that I prepared it.

Q. You prepared it?

A. In our office.

Q. After having this group discussion?

A. It was after the group discussion.

Q. Do you think, then, that you sent copies of your statement to the other companies that had representatives at this group discussion?

A. Well, I may have done it. As I say, they may have known something of this. It was no secret. They may have asked for copies of that.

Q. Were you aware that other companies did use the same form of statement of method of marketing cement that is represented in the statement that your company used?

A. No, I wasn't particularly aware of it. Some of them may have copied it or used it as their way of doing business. I don't know. I have no knowledge, definite knowledge that they did.

Q. Did you attend a meeting in Chicago attended by representatives of dealers' associations at which the subject covered by your method of marketing cement statement that you have in your hand was discussed?

A. No, sir.

Q. How did you come to prepare such a state-
13181 ment? Did somebody instruct you or suggest it to you or did you volunteer it?

A. Well, it was just—I don't know how I personally

came to prepare it. I have said before, we have had a method of marketing, sales policy, and a method of marketing for a long time, and this was brought into existence to put it down in a handy way after we issued our policy of April 9, 1935.

Q. Can you say whether or not you provided the Code Authority with a copy of your method of marketing cement which you have compiled?

A. I don't recall sending any copies of this at all.

Q. Did you provide the trade practice committee that succeeded the Code Authority with any copies of the statement that you compiled?

A. I have no knowledge of that.

Q. Were you aware of any general distribution of that form and substance of a statement of marketing method of cement in the trade?

A. No, sir.

Trial Examiner Norwood: Cross-examine.

Mr. Leisure: No questions.

13182 *Recross Examination by Mr. Zimmerman.*

Q. Mr. Scovel, when Mr. Wooden was asking you about your method of figuring freight rates, in the course of that colloquy you said that the practice, or some practice was just the same as when you first came into the business. Now, I am not just quite clear on it, and I want to ask you if you meant by that, that the method of dropping the fraction in figuring freight rates for the purpose of determining and quoting a delivered price was the practice that you had reference to as being just the same when you came into the cement business?

13183 A. That is my recollection. That is what I meant.

Q. And it has not been changed since that time?

A. No, sir, it is still in effect.

(COM. EX. 2359-A to F, both inclusive, was offered and received in evidence.)

Redirect Examination by Mr. Wooden.

Q. Can you approximate the time, Mr. Scovel, at which this group meeting that you described occurred?

A. Why, I think it was sometime in the early part of

1935, after the sales policy had been—our sales policy had been distributed to the trade. That was after April 9th.

Q. You mean the meeting was held after April 9th that you are talking about?

A. That is right.

Q. And the statement of method of marketing is
13184 dated May 28th?

A. It was the outgrowth.

13185 O. H. D. ROHWER, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am vice president of the Universal-Atlas Cement Company, Chicago, and have occupied such position since August, 1937. Prior to that time I was assistant general sales manager for the same company from 1930 on. I started with the company in 1916. The function which I exercise in my present position is general supervision in sales over all territory east of the Rockies and west of the Mississippi, upper Wisconsin and upper Michigan. I have not at any time occupied any official position in
13186 The Cement Institute and have not headed any committees of the Institute.

Q. Showing you a paper marked for identification as Exhibit 2268, will you state whose handwriting and figures appear on that paper?

(Handing document to witness.)

A. No, I can't recognize any of that.

Q. Will you tell us how the Chicago delivered price is calculated?

A. I cannot, Mr. Wooden. I do not handle that.

Q. Who in your organization does?

A. Mr. Cronkrite.

Q. Mr. Cronkrite. What is his position with the company?

A. Vice president.

Q. Showing you a paper marked 1939, for identification, have you seen that paper before, or a paper of which that is a photographic copy?

(Handing document to witness.)

A. I have seen this, Mr. Wooden.

Q. Under what circumstances? Where and when?

A. It was passed over on my desk for observation.

Q. At the time of its receipt, or, what is the time? Is there any time indicated on it?

A. I don't see any.

Q. Is that a teletype communication?

A. That is a teletype communication, which, if I
13187 remember correctly, was from someone making an inquiry about this price, and it was during the Code, and they wanted us to find out what prices were filed, if I remember this thing correctly.

Q. From whom was this communication received? Was it received from H.—

A. I am trying to figure this out. Just a minute.

Q. —from H. N. L.?

A. This evidently is a teletype between our Waco and Kansas City offices.

Q. Who is H. N. L.?

A. H. N. L. was one of our clerks in the Waco office, H. N. Lightner, L-i-g-h-t-n-e-r, and D. R. S. was our chief clerk in our Kansas City office, D. R. Sutherland, S-u-t-h-e-r-l-a-n-d, and it was passed over my desk as a memo.

Q. You think the time of it was sometime during the Code period?

A. Yes, I am of the impression that it was during the Code period. However, I can't say definitely.

Mr. Wooden: I will offer 1939.

Trial Examiner Norwood: Any objection?

Mr. Hershberger: No objection on our part, as far as Universal is concerned.

Mr. Leisure: We make the usual objection we
13188 have made before, that it is Code material and we feel that it has no proper part in this case. Also, that we ask it be received—it is an inter-office communication, and we ask it be received only as against the company who made it.

Mr. Zimmerman: I understand that amounts to an objection to its being received except as to Universal-Atlas.

Trial Examiner Norwood: Yes.

Mr. Zimmerman: But I think that ought to be reserved as to all exhibits, and I understand that it is, except insofar as there is some connection shown between the exhibit and other respondents.

Trial Examiner Norwood: I think so.

Mr. MacIntyre: Your Honor please, in that connection we had a ruling that we have had heretofore, that is, that the connection may be had with respect to anything in the record in the way of documentary evidence or testimony, is that correct?

Trial Examiner Norwood: As the connection is shown by the entire record. Yes, we have had that up and that is the understanding. The objection is overruled.

Mr. Leisure: I don't know with whom that understanding was had.

13189 (COM. EX. 1939 was offered and received in evidence.)

Trial Examiner Norwood: Mr. Leisure, I have made that the condition heretofore.

Mr. Leisure: Well, lawyers have a habit of using words such as "understanding" as meaning agreement or stipulation.

Trial Examiner Norwood: No, I didn't mean it in that sense.

Mr. Leisure: I didn't want to be misunderstood later.

Trial Examiner Norwood: I am not certain that the record does not show some meeting of the minds as to how this testimony should be applied. I have announced how it would be applied. I am not sure that some of the counsel have not agreed to it.

Mr. Leisure: I take it mere silence will not be taken as consent or agreement to anything of the kind such as Mr. MacIntyre stated. That is all I want to be sure of.

Trial Examiner Norwood: I think so, yes.

By Mr. Wooden:

The witness identified Com. Ex. 1947 as a photographic copy of a paper which he received from his company's Mr. Boice in Texas. In that connection there also came to the witness a communication from a Mr. Bingham to Mr. Boice, which was handed to the witness and which is marked 1941, for identification. Mr. Bingham is a special representative whom "we" have in the oil fields in Texas. He reports to Mr. Boice. The witness doesn't remember having seen a paper marked 1940, for identification. Smith is "our" salesman in Houston, Texas, at this time. He doesn't

13191 recall the documents. It could be an inter-communication between the Texas office and the salesman.

Mr. Wooden: This 1940, your Honor, was produced here by Mr. Lindahl under subpoena, and in view of that circumstance I will offer it. I will offer 1947, 1941 and 1940 at this time. All three papers are interrelated by reference in themselves. Mr. Lindahl testified those papers were copies of papers from the files of the Universal-Atlas Company.

Trial Examiner Norwood: Yes.

Mr. Leisure: As to 1947 we ask that if it be received, it be received as only against the Universal-Atlas Company.

As to 1940, there being no identification whatever, we object to the exhibit as being incompetent, irrelevant and immaterial.

As to 1941, we make the same objection as to the first exhibit, that it be confined and received as against the Universal-Atlas only.

Trial Examiner Norwood: Off the record.

(A discussion ensued off the record.)

Mr. Hershberger: May I ask a question at this time?

Trial Examiner Norwood: Certainly.

13192 By Mr. Hershberger:

Q. Did you say, Mr. Rohwer, that you had not seen these two letters, 1941 and 1940, or had you seen one of those?

A. I had seen this (indicating), and I had seen that one (indicating), but I had not seen this one, 1940.

Mr. Hershberger: I don't think we have any objection to them, your Honor.

Trial Examiner Norwood: When the counsel are through with them. I will look at them.

13193 (COM. EXS. 1940, 1941 and 1947 were offered and received in evidence.)

By Mr. Wooden:

Q. Mr. Rohwer, did you receive in due course of mail the original of the paper I show you marked as Exhibit 1943, for identification?

A. Yes, sir.

Q. From your Mr. Boice?

A. Mr. Boice.

Q. At Waco?

A. At Waco.

Q. What are the initials in the upper—

A. That is J. D. S.

Q. What does that mean?

A. It means that as the mail comes in, it goes over Mr. Scovel's desk first, and what he thinks I ought to see, he passes on to me. He has passed that on and let me know that he has seen it.

Q. Those initials, J. D. S., are in Mr. Scovel's
13194 handwriting?

A. Yes.

Q. Did the Universal-Atlas belong to an organization in Texas known as Texas Cement Industries?

A. They do belong.

Q. What is that organization, Texas Cement Industries?

A. It is an organization to rather acquaint the people of Texas with the purposes of the promotions of the cement industry in Texas, uses, what is made out of the raw materials of Texas. It is more or less of a public relations organization.

13195 Q. Did it also have statistical functions?

A. It had no statistical functions. I have the by-laws in the office, and it was submitted and approved by the Attorney General of Texas before it was incorporated.

Q. The organization, has it compiled or distributed any information regarding production or shipments or stocks on hand?

A. None whatsoever.

Q. Would you say it is wholly a matter of acquainting the public in Texas with the uses of cement?

A. That is just one of the functions of it, Mr. Wooden. I would have to give you the by-laws. I don't know it by heart. I have it at the office if you want it.

13196 Q. Well, if you can give me an idea of just what those other activities of the organization were, besides the one you have specifically named, I would like it.

A. Well, that is as near as I can remember it.

Q. Was there some objection made to membership in it on the part of some Texas cement companies?

A. I don't think there was. I think there was an objection made by some of the Texas cement companies' attorneys as to its legality. Therefore, it was submitted to the Attorney General McCraw from whom we have a letter that it was all right and perfectly legal.

Mr. Wooden: That is 1943, and I will withdraw the offer for the time being.

By Mr. Wooden:

Q. Showing you exhibit marked 1940, for identification, Mr. Rohwer, will you state whose initials appear in the lower lefthand corner?

(Handing document to witness.)

A. I would say that it is my judgment that that is one of the young ladies in our New York office.

Q. Who?

13197 A. One of the clerks, one of the clerks in our New York office.

Q. And who?

A. Miss Carlson, C-a-r-l-s-o-n.

Q. And the first name?

A. Well, I can't give you the first name,—J. C. That would be my judgment.

Q. Have you seen this paper of which 1950 is a photographic copy?

(Handing document to witness.)

A. I never saw that paper until Mr. Bouldin of Texas went through our file and a photostatic copy was made of it. That was the first time I saw it.

Q. Do you know in whose handwriting the heading on the paper or any of the other writing on it is?

A. No, I can't identify that definitely.

Q. Do you know anything about the meaning of the paper or its presence in your files, how it came to be there?

A. I have no idea.

Q. As I understand it, you didn't know it was there until Mr. Bouldin located it?

A. I didn't know it was there until Mr. Bouldin brought it out.

Q. Showing you 1951-A and B, for identification. Did you receive the original of that paper in due course

13198 of mail from your Mr. Boice?

(Handing document to witness.)

13199 A. Yes, sir, I received this letter.

Q. The initials on the upper righthand margin, can you state whose they are?

A. J. D. Scovel. (Indicating) This is my handwriting, "F. L. S." and "O. H. D. R." That is "A. D. S." all in my handwriting.

Mr. Wooden: I offer the entire document including those handwritten notes.

13201 (COM. EX. 1951-A and B was offered and received in evidence.)

Q. Is the pencil, or, I mean, is the handwritten note on the margin of page 2, the next to the last paragraph, is that yours, Mr. Rohwer?

A. That is my writing.

Mr. Wooden: I include that in the offer.

By Mr. Wooden:

Q. Is the paper I now show you marked 1945, for identification, an authentic copy of a communication that you sent to your Mr. Wiggins at Birmingham?

(Handing document to witness.)

A. Yes, sir, I know about this letter.

Q. You wrote the letter?

A. I did not write the letter.

13202 Q. It appears over your name?

A. It is dictated by Mr. Scovel.

Q. For your signature?

A. No, I didn't sign it. That is, to the best of my recollection, I didn't sign it. I think I only saw a copy of it and then sometime afterwards.

Q. After it was sent?

A. After it was sent.

Mr. Wooden: I will offer 1945.

Mr. Leisure: We have no objection, other than it is an inter-office communication and we ask it be confined as against the Universal-Atlas Company alone.

Trial Examiner Norwood: Any further objection?

Mr. Hershberger: Yes, I want to object on the ground that this has no bearing whatever on any issue in this case. It is merely a report from a salesman about a job in Louisiana and has nothing to do with any charge of collusion. I can't see how it has anything to do with any relations between Universal and any other cement company.

Mr. Wooden: I would direct your attention particularly, your Honor, to the statement attributed to Mr. Boyce, a representative of the witness' company, describing talks with contractors, saying, "They would give us the cement on the two Sabine River jobs if our price was

13203 lower than any other price they are apt to get, which, of course, it won't be."

(COM. EX. 1945 was offered and received in evidence.)

13204 Q. Mr. Rohwer, I show you a paper marked as 1952, for identification, have you seen the original of which that paper is a photographic copy before?

A. I can't say whether I have or not, Mr. Wooden. If this came out of our office, I have.

Q. It was produced here by Mr. Lindahl.

A. Then I have seen the original.

Q. Do you know who compiled it?

A. We had a young man in our office to whom we sent all our prices as we picked them up, and he compiled them, and that was for our own office information and our sales managers' information. That is really our price list.

Q. This included a great many points at which you did not have mills?

A. That is right.

Q. Basing points?

A. I think they are mostly basing points there. I am not sure of that. I can't remember all the basing points. I don't remember that Alsen, New York, was a basing point. However, it may be. That is the east. I don't know much about that.

Q. Did you give it any distribution other than among your own force?

A. I don't think we did. I don't know.

13205 Q. Who would know?

A. Well, I imagine Mr. Stone. That is the country over.

Q. I note on this paper—

Mr. Wooden: Well, maybe I had better offer it first. I will offer this Exhibit 1952 in evidence.

Examination on Voir Dire by Mr. Hershberger.

Q. Did you distribute this to any competitors in your territory that you managed?

A. No.

13206 *Direct Examination (resumed) by Mr. Wooden.*

Q. Do you know whether or not someone else in your organization gave it such distribution?

A. I haven't any idea.

13208 (COM. EX. 1952 was offered and received in evidence.)

Q. I note from this Exhibit 1952, Mr. Rohwer, that there are a number of points that are listed but no prices appear opposite them. For instance, Fultonham, Ohio, Osborn, Ohio, and Painesville, Ohio. Can you explain that?

A. I can't explain that, Mr. Wooden. I had nothing to do with the making up of that price sheet.

Q. Ada, Oklahoma, is also listed but no price. Can you explain that?

A. I can't explain it.

Q. Were you aware that, or is it a fact that all those points were at one time basing points but were discontinued as basing points later on?

A. I am not aware of that. That might be so.

13209 Q. All right. Showing you 1946, for identification, have you seen the original of which that is a photographic copy before?

(Handing document to witness.)

A. I have never seen the original of this letter, but I have seen these photostatic copies.

E. D. HILL, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am vice president of the Louisville Cement Company and have been for about 10 years. The mill of that company is located at Speed, Indiana. It is not the only mill; they have a mill at Brixment, New York, where we

13210 manufacture masonry cement, and mills at Milltown, Indiana, where we manufacture lime and crushed stone.

Q. Is the mill at Speed, Indiana, is that a basing point?

A. Yes, sir.

Q. How long has that been a basing point?

A. About four years.

Q. Did you initiate the action which made it a basing point?

A. At this time, yes, sir.

Q. At this time?

A. Yes, sir.

Q. Was there a previous time that it was a basing point where you did not initiate it as such?

A. Yes, sir.
Q. When was that?
A. About 1932, I think.
Q. What were the circumstances under which it became a basing point at that time?
A. One of the other companies sent out quotations that apparently were using our mill as a base.
Q. What other company was that?
A. The Lehigh.
Q. Was that done without any warning or notice to you?
A. Yes, sir.
Q. What effect upon the business of the Louisville Company did the initiation of the base price at its mill by the Lehigh Company have?
13212 A. There was no particular effect on our business, except, if I remember correctly, it was a very low base price. It did not affect the territory which we attempted to sell. Does that answer your question?

By Mr. Wooden:

Q. It does in part. Do I understand by that that you held the volume of your business but at a price dictated by the low base at Speed?
A. As far as I can recall, yes, it did.
Q. What was that Speed base price put in by Lehigh?
A. I have forgotten those figures.
Q. Did that mark the maximum that you could obtain for any of your cement after that base was put in there?
A. I do not know, sir, because there might have been points that I could have gone to at some considerable distance and gotten a larger net.
Q. Selling at a delivered price?
A. No. I believe that would make the price on all our cement. I could not get any more than that.
Q. Yes. Had you been taking business at mill nets as low as the new mill base that was put in there at that time?
A. I had cut some contract prices that would indicate that I was willing to take that figure at my plant.
Q. You were willing to take it on some business, whether or not on all?
13213 Q. I take it, then you were not willing to take it on all of your business or you would have done so?
13214 Trial Examiner Norwood: And I shall sustain the objection to the question as to its form, but I

shall say that counsel has a right to bring out explanations.

Mr. Zimmerman: I did not hear any answer to that question, but if there was one, I move to strike it out, whatever answer it was.

Trial Examiner Norwood: Motion allowed.

By Mr. Wooden:

Q. Mr. Hill, had you in fact been taking lower mill nets on some business than the mill nets represented by the base price that was put in at Speed?

A. I don't recall definitely.

Q. What were the contracts that you referred to as cutting?

A. I remember having taken a contract in Indianapolis.

13215 Q. Was it State business?

A. I don't know.

Q. You talked about cutting contracts. What did you mean by cutting contract prices?

A. Lower than our regular current prices.

13216 A. Lower than our regular current prices.

Q. And were your regular current prices figured on a delivered basis?

A. Yes, sir.

Q. And was the lowest sum of basing point price plus freight from basing point to destination?

A. Yes, sir.

Q. And you cut the delivered price in this particular business that you referred to?

A. Yes, sir.

Q. At Indianapolis?

A. Yes, sir.

Q. Was that a large volume?

A. I have forgotten the size, but it was a pretty good sized contract.

Q. Was it state business?

A. I don't remember.

Q. You don't know. Were there other contracts that you cut about the same time?

A. Not that I recall.

Q. Did you ever make any statement to the Lehigh Company about their putting in a base there at Speed?

A. No.

Q. How long did the base price then put in by Lehigh remain in effect?

13217 A. I think around two or three months.

Q. Was the base price at Speed there removed entirely after two or three months?

A. What is the question?

(Question read.)

A. Yes, sir.

By Mr. Wooden:

Q. Did you then go back to figuring on some other base plus freight from the base point to destination?

A. Yes, sir.

Q. What was your base or base points that you used?

A. I have forgotten. I think that there was a base made at the Kosmos plant right near us right about that time.

Q. Do you know whether the Kosmos base was lifted or removed about the same time the Speeds base was?

A. I don't know, sir.

Q. What was the occasion on which Speed again became a base point?

A. Several years ago there was a considerable adverse comment about the basing points generally as affecting cement mills, and we thought it would just be better to put in a base at our mill even though it only affected a small area.

13219 Q. Do you consider the making of a base price at your mill by an outside mill as especially injurious to your mill?

A. We don't object to them putting a price at our mill if they make it high enough. We want to get all the money we can for our product.

Trial Examiner Norwood: When they did put in this base price there, did it reduce your volume of business or reduce your income?

The Witness: It didn't reduce appreciably our volume of business. It did reduce our net earnings at the plant because it reduced our current prices everywhere.

By Mr. Wooden:

13220 Q. Reduced your prices everywhere: is that what you said?

A. (Witness nods head affirmatively.)

Q. Has your company been a member of The Cement Institute?

A. Yes, sir.

Q. During what period of time?

A. When the NRA was put into effect, and it was decided The Cement Institute would be the vehicle through which the provisions of the NRA would be carried out, we joined The Cement Institute. We wanted to co-
13221 operate in every way in carrying out the NRA. We stayed members of The Institute until shortly after the NRA went out, when it was—we resigned.

Q. Does your company use the freight rate books of The Cement Institute?

A. Yes, sir.

Q. Do you still use them?

A. Yes, sir, for certain purposes.

Q. Do you use them for the purpose of calculating delivered prices?

A. Yes, sir.

Q. At destination?

A. Yes, sir; our greatest use is in marketing our masonry cement.

Q. Do you mean from the New York plant?

A. Yes, sir.

Q. Do you use them at the Speed plant also?

A. Yes, sir, in the sections where we are actively selling Portland cement, we have our own freight books that are kept right up to date, and we use The Institute freight book only as a check against ours; in the districts farther out from our Speed plant where we are not conversant with the freight rates as much as we are near our plant, we use these in handling the marketing of our masonry cement, brick cement.

13222 Q. When you say "these", you mean The Institute freight rate books?

A. Yes, sir.

Q. In that outlying territory where you are not so familiar with the rates, do you use The Institute freight rate books for marketing your standard Portland cement?

A. Yes, sir. States like Arkansas, that distance from us, we would use them for any Portland sales.

Q. When you find any difference between your own compilation of freight rates and The Institute compilation of freight rates, what do you do?

A. We use ours, if they are lower; we use The Institute's if they are lower.

Trial Examiner Norwood: Do you find many differences?

The Witness: Occasionally.

By Mr. Wooden:

Q. Would you say rarely?

A. Occasionally.

Q. Would you say rarely?

A. I don't know. Our traffic department handles that.

Q. What do you mean by "occasionally"?

A. I don't know how often. I would say there may be some particular point where our traffic manager's interpretation of a rate would be different than that
13223 given in The Institute book, in which event we would use that, if that was a lower rate.

Trial Examiner Norwood: That has been your practice right along?

The Witness: Yes, sir.

By Mr. Wooden:

Q. Do you know how The Institute freight books compare with the rates that the railroads use in the collection of freight on your shipments?

13224 A. I do not. I am not sufficiently equipped to answer that.

By Mr. Wooden:

Q. Is one of your purposes in using The Cement Institute freight rate books that you may calculate your delivered prices in the same way that other mills do?

A. I don't think that necessarily follows. We want to be competitive, and it helps us to—

Q. Well,—

Trial Examiner Norwood: Let him answer.

A. —figure out our rates that we want to quote.

13225 Q. Do you mean to make your delivered prices the same as your competitors?

A. We like to be as low as our competitors.

Q. And you don't like to be any higher?

A. No, not unless the business is unattractive to us. Then we don't mind being a little higher.

Q. In other words, you do aim to make your delivered prices the same as your competitors?

A. We try to hit the lowest price in our market.

Q. And in trying to hit the lowest price, delivered price, do you use the lowest sum of the basing point price plus freight from that basing point to destination?

A. Yes, sir; that is the general way we figure it.

Mr. Wooden: Will you give these the next numbers, please?

(The paper writings referred to were marked "Commission's Exhibits 2360-A, B and C, and 2361-A, B and C", for identification.)

By Mr. Wooden:

Q. Now, I show you papers marked as Commis-
13226 sion's Exhibit 2360-A, B and C, for identification. Can you tell us whether you have seen those papers before?

A. I don't know that I have ever seen them before.

13227 Q. Do you recall that any figures were supplied to a Mr. Bangert representing the Federal Trade Commission by your Mr. Gray?

A. No, sir, I do not.

Q. You have a Mr. Gray in your organization?

A. Yes, sir.

Q. Who is he?

A. He is our secretary and treasurer. Mr. H. S. Gray is our secretary and treasurer.

Q. Showing you papers marked 2361-A to C, inclusive, have you ever seen those before?

(Handing documents to witness.)

A. I don't know that I have ever seen them, sir.

Q. When did your company become a member of The Cement Institute?

A. It was shortly after the N.R.A. came into effect.

Q. Had you been using The Cement Institute freight rate books prior to your becoming members?

A. I couldn't answer that, sir.

13228 Q. What is the base price at Speed now?

A. I think it is $2.15 in cloth.

Q. Is that $1.60 stripped with all discounts off, or $1.65, I mean?

A. $1.65.

Q. Did you take as low as $1.10 mill net on some of your business in 1932?

A. I don't remember the figures, but we sold at mighty low prices during the depression; very low.

Q. Do you mean as low as $1.10 or lower?

A. We sold as low as $1.10 during the depression.

Q. Didn't you sell even lower than $1.10 at some points?

A. What was your question?

Q. For delivery at some points didn't you sell lower than $1.10?

13229 A. During the depression we sold for less than $1.10 at our plant in some instances.

By Mr. Wooden:

Q. When you did—did you bid on Illinois Highway Commission business in 1933?

A. I don't remember that, sir.

Q. Were you offered by the Highway Commission of Illinois 350,000 barrels at a figure that would have netted you $1.10 at the mill?

A. I don't recall that.

13230 Chicago, Illinois,
January 11, 1939.

13234 E. D. HILL resumed the stand and testified further as follows:

Direct Examination by Mr. Wooden.

13235 Q. I think the last question I asked you last night, Mr. Hill, was regarding an offer by your company to the Illinois Highway Commission for a large quantity of cement at $1.10 mill net.

A. Yes, sir.

Q. You remember that?

A. Yes, sir; I remember the question.

Q. Yes. Showing you papers marked as 2362 and 2363, for identification, purporting to be an exchange of telegrams between your company and the Illinois Highway Commission director, I believe, does that refresh your recollection about the matter?

A. During 1933 our sales were handled by the sales manager, Mr. Courteney, who died the latter part of 1933. I may have seen this, but I don't recall any of the details

of it. Mr. Courteney handled all of the details of our sales during that time.

Q. And that means that your recollection is not refreshed by those papers that I just showed you?

A. No. I may have seen this, but I do not recall the details of it.

Q. Showing you Exhibits 1860, 1861, and 1862-A and B, being correspondence between the Indiana Highway Commission and your company, and the Indiana Highway Commission and the Universal-Atlas Company—

A. The details of this sale were handled by our
13236 Mr. Courteney, but I remember now I found these files, and I am conversant with this particular contract.

Q. Will you state just what circumstances led to that method of handling those particular sales?

A. If I remember correctly—

Mr. Leisure: Mr. Wooden, are you referring to the exhibit?

Mr. Wooden: Yes, referred to in the exhibits. They are the ones where Universal filled some orders for Louisville down near the Louisville mill, and vice versa.

A. As I remember it, the Indiana State Highway Commission took bids on about 1,400,000 barrels of cement. We bid on 500,000. At a point up in the northern part of the state near Valparaiso, in submitting our bid, we found that we had made a mistake in our bid at the point near Valparaiso, which made our quotation very much lower than we anticipated to bid. This error was brought about by—

Mr. Wooden:

Q. Let me ask a question right there. Were your bids in that locality lower than the destination prices calculated on a basing point price applicable plus freight?

A. If I remember correctly, our prices up through that section were the market prices.

Q. The delivered price?

13237 A. Yes, sir.

Q. What did you mean by saying that your prices up there were lower than—what was the expression you used? Lower than what?

A. I said the price that we actually quoted at Valparaiso was lower than we intended to quote.

Q. Even though it was the regular destination price?
A. I don't quite get you.
Q. I thought you said that you quoted the regular destination price and yet quoted lower than you in-
13238 tended to quote. Is that right?
A. No, we quoted a delivered price but that price at this particular point was lower than we intended to quote.
13239 Q. Was it lower than the regular destination price?
A. It was lower than our market price at that particular point.
Q. And was your market price at that particular point the sum of the applicable base point price plus freight?
A. That we thought was in effect at that time.
Q. Yes, all right.
A. This mistake in our quoting was brought about by an error in transcribing from the work sheet to our regular bid form. Mr. Courteney failed to check it and had not discovered his mistake until after the bid had come in.
Q. Can you say how much lower it was?
A. It was 9 or 10 cents, if I remember correctly.
Q. Per barrel.
A. Per barrel.
Q. At one destination or a number of destinations?
A. On one destination, if I remember correctly.
Q. Was that Valparaiso?
A. I think there were two contracts right in that section, close to Valparaiso, one large and one small.
Q. And you were low on just one of them?
A. I think I was low on only one point.
Q. You got the contract, as I understand it?
A. Yes, sir.
Q. All right. Now, go ahead and tell us what
13240 happened?
A. When we found that that mistake had been made, we went to the Highway Commission and told them just how the mistake had been brought about. They were quite sympathetic with our predicament, but said they would have to hold us to that bid.
In bidding on this work we bid on 500,000 barrels, feeling certain that we would not get all that we bid on, but we would have furnished it had we received it.
And it turned out, at that particular point where there

was a low price bid, the Indiana State Highway Commission needed about 50,000 barrels of cement. They actually awarded to us between 90,000 and 100,000 barrels, and 50,000 of that award would have had to have been delivered up at that point at a considerable loss to us.

So we talked to the Commission, and when we could not get out of the bid, we arranged, with their approval, for the Universal to supply that contract, and from a freight rate which would probably have been more attractive to them than to us, and in return for their supplying that contract we persuaded them to let us fill a contract in Tippecanoe County near Lafayette.

Q. That is nearer your mill—

A. Yes, sir.

Q. —than Valparaiso?

A. Yes, sir.

13241 Q. Did you take the initiative in arranging the matter with Universal?

A. I had forgotten about that, but I imagine we did, because we were in a bad fix.

Q. Was your mill net on that Valparaiso bid lower than mill nets you were getting at other points, some other points?

A. I don't know, but business in that locality generally was not attractive to us.

Q. How was the payment—how was the shipment and payment on those exchanged contracts handled?

A. We received an order from the Highway Commission to ship on the Valparaiso job. We asked the Universal to make the shipment. The Universal billed us for that shipment and we billed the Indiana State Highway Commission.

Q. You paid it—no, you billed them and they paid you?

A. Yes, sir.

Q. And was it just the other way regarding the other shipment?

A. Yes, sir.

Q. I note according to Exhibit 1860, rather 1861, I think, that you proposed shipping for Universal 23,885 barrels and that they shipped for you 23,220 barrels. What was done about the difference of some 500 barrels that was represented in those figures?

13242 A. I don't quite follow you there. Are you sure that is true?

Q. I only know what is in the document.

(Handing document to witness.)

A. What is the question you asked, Mr. Wooden?

Trial Examiner Norwood: Read it.

(Question read.)

A. As I remember it, there was about 50,000 barrels in the Valparaiso job that we had Universal ship for us, and there were some 43,000 in jobs near Lafayette that we were going to fill. We did not get to ship as much cement in the exchange as the Universal Company shipped.

Q. By how much?

A. I don't recall those figures.

Q. As much as six or seven thousand barrels?

A. I think there was about that much difference.

Q. Was an arrangement of that sort made, a similar second arrangement so to speak, that increased the quantities above the quantities referred to in those exhibits?

A. I don't think so. This was the best we could do. This was the best trade we could get, to get out of a bad fix.

Q. Was any adjustment made between the companies to take care of any difference in the number of barrels shipped—

A. No, sir.

Q. —by each for the other?

13243 A. No, sir.

Q. Do you buy incor cement from the Lone Star?

A. We used to buy it.

Q. Did you buy it on basis of f.o.b. the Lone Star mill?

13244 A. I think our arrangement for buying incor was that they sold us on a delivered price and allowed us a manufacturer's discount.

13245 Q. Is the paper I now show you, marked 2365, for identification, a copy of your reply to it?

(Handing document to witness.)

A. I wrote that letter.

Q. Do you sell your Brixment cement to other cement manufacturers?

A. Yes, sir.

Q. Do you sell it f.o.b. mills?

A. Yes, sir.

13247 A. We sell brixment to other manufacturers on a consignment basis. We will take care of the freight

to their plant, and the freight beyond that plant to their customers.

By Mr. Wooden:

Q. Do other manufacturer stock it at their plants?

A. Yes, sir.

Q. Do you prepay the freight on to their plant?

A. We pay the freight—I don't—I think up to their plant we ask them to pay the freight, and when they issue us a report at the end of the month as to how much brixment they have shipped, they are allowed to deduct the freight that they have paid from our mill to their mill.

Q. And you pay the balance?

13248 (COM. EX. 2364-A and B, and 2365 were offered received in evidence.)

The witness identified Com. Ex. 2366-A and 2366-B as papers that came from "our" files. They were papers that were used in the ordinary course of business. "We" sell brixment to 25 cement companies and about 60 plants.

"Q. You can add anything you like if you will just say 'yes' or 'no'.

"A. Yes, sir.

"Q. You did use it, and you now care to explain how?

"A. Yes, sir.

"Q. Well, I will give you that opportunity in a minute.

"The pencil handwriting on the papers, will you 13249 state whose it is?"

Most of the pencil handwriting on the papers, he thinks, are the handwriting of "our" traffic manager, Mr. Uptegrove. "This" does not look like his handwriting. A correction to a basing point up in Michigan, which was sent in by our Mr. Kemp under date of 7/9/36, does not look like Mr. Uptegrove's handwriting. The witness does not know whose handwriting it is. It does not look like Mr. Uptegrove's. Most of the others looks like Mr. Uptegrove's handwriting as far as he can identify it.

Q. Where did you get the information on base prices that is included in that list?

A. I don't know where this list came from, Mr. Wooden. We keep a running list, as near as we can, all over the country where the basing points quote them, because it is so necessary for us in quoting our brixment which 13250 we ship all across the country.

Q. Was this list made up in your office?

A. I don't know. That is probably several years old. We add to it and correct it and bring it up to date. Whenever we can get any information from anybody about any change of a base in portland price anywhere.

Q. And these are the portland prices that are on that list?

A. Those are supposed to be the prices at which portland is based on at the different points.

Q. Did you figure your prices for standard portland cement according to the base prices included in the list?

A. We corrected this list as near as we could find out from time to time for any points where we ship portland cement.

Q. And was the original list dated April, 1935, and did you bring it up to date by making corrections?

A. I don't know. I don't know that, sir. We have been keeping a list similar to that for years and years.

Q. Well, there are some dates in pencil handwriting and changes in dates as late as 1936; aren't there?

A. Yes, sir. Sometimes those lists will get so cluttered up with corrections and pencil memoranda, we will copy the whole thing over and start over again. Now, we have been doing that for years.

Q. Did you have other copies of such a list in 13251 use in your organization?

A. No, that is just kept by our traffic manager.

Q. And it is the only copy that your organization made, then?

A. As far as I know. Of course, he handled it.

Q. Would you say that is a carbon copy?

A. It looks like a carbon copy, yes, sir.

Q. Do you know whether other copies were made?

A. No, sir.

Q. Did that list ever come to to you from outside your organization?

A. I don't know where it came from.

Q. Did it come to you in the mail?

A. I don't know.

Q. Did you ever have other lists of similar character come to you at any time?

A. Not that I recall.

Q. Have you attended meetings where other cement manufacturers were present?

A. I attended the Portland Cement Association.

Q. You say you have attended meetings of the
13252 Portland Cement Association?

A. Yes, sir.

Q. Never attended meetings of the Institute?

A. Yes, sir, during the NRA.

Q. Did you ever obtain information on basing point prices while in attendance at any such meetings?

A. Whenever I visit anybody, if he can tell me anything about any change of prices anywhere in the United States, I try to get it and pass it right on and post it on that list.

Q. Well, is your answer, then, that you have obtained information about basing point prices while in attendance at meetings?

A. No, I don't mean to convey that.

Q. Well, what is your answer?

13253 A. What I am trying to convey to you is, as I talked to individuals in attending cement meetings or Institute meetings, if they could tell me any changes in base prices on the Atlantic Coast or out on the gas belt or anywhere else, I was very glad to get it, and I immediately transferred it to our records for our general use in the office.

By Mr. Wooden:

Q. You made a note of it at the time?

A. What is that, sir?

Q. I mean, did you make a note of it at the time you got the information?

A. Always tried to. Now, our men are instructed to do the same thing. Our salesmen, whoever hears a change in base price, he sends it in to us, and that is added to that list.

13256 Q. Referring to papers, 2366-A and B, for identification, do I understand that while that list and its corrections were in effect during the period shown by the dates thereon, that you used that as a starting point to build up your delivered prices on standard portland cement by adding the freight from the applicable basing point to destination?

A. This list was used more by us for a measure of our brixment prices than portland, although we did use
13257 it for portland, but in the area where we sell portland, we know those basing points every day; we don't have to refer to them.

By Mr. Wooden:

Q. But you did use it for the portland as well as brixment?

A. Yes, sir.

Mr. Wooden: I offer 2366-A and B.

Examination on Voir Dire by Mr. Leisure.

Q. Do you have more than one office in your company, more than one location of an office?

A. Handling portland cement?

Q. On anything. Any kind of cement, brixment cement or portland cement.

A. We have a number of offices handling brixment.

Q. Do you sometimes send copies of documents between your offices, inter-office communications?

A. Yes, sir.

Mr. Leisure: Your honor, I would be very glad to have this in the record, but I don't see how it is material. It comes from a non-respondent; it is not connected with the respondents in any way. I think it is my duty to 13258 object to it as incompetent, irrelevant and immaterial.

Trial Examiner Norwood: I think that anything reflecting the price situation during this period might be shown to be relevant.

Mr. MacIntyre: If your honor please, let us refer for a second to the testimony of this witness to the effect that at some meetings of the respondent Cement Institute and its members, he secured certain basing point prices, certain basing point price information which in part makes up this list.

Mr. Leisure: No, that is not the testimony. He 13259 doesn't say that makes up this list. He said he tried to get information on prices when and wherever he could.

Trial Examiner Norwood: Yes, I think so.

Mr. Leisure: That is certainly proper. And when he got it, he forwarded it to his office.

Isn't that the testimony?

Trial Examiner Norwood: I think so.

By Mr. Leisure:

Q. Isn't that the testimony, Mr. Witness, that you gave?

A. Yes, sir.

The Witness: Judge, Mr. Wooden made the statement that we were members of the Institute in 1935 and '36. I think that we resigned from the Institute in September, '35. I think that is the date.

Mr. Wooden: But not effective until September, '36, wasn't it?

The Witness: That is correct.

Trial Examiner Norwood: I think this price list—

The Witness: It was effective then, but we paid 13260 dues for the next year.

(COM. EX. 2366-A and B was offered and received in evidence.)

13261 By Mr. Wooden:

Q. In what territory do you sell your standard cement?

A. Mostly in Indiana, Kentucky, parts of Ohio, and Illinois, and Tennessee. There may be points farther out than that that we would sell in a mixed car with our brixment.

Q. In what approximate territory does your basing point at Speed govern the delivered price?

A. A small part of southern Indiana.

Q. Is that all?

A. Yes, sir.

Cross-Examination by Mr. Leisure.

Q. Mr. Hill, I think you told Mr. Wooden yesterday on direct examination that it was your practice to sell cement at destination prices?

A. At delivered prices.

Q. And how long have you been selling cement at delivered prices?

A. As far as I can remember, ever since I have been in the business.

Q. When you told him also that you sell at the identical prices, or to use Mr. Wooden's language that he has used so much in this case, you try to make your de-
13262 livered price the same price as your competitors, isn't that true?

A. I try to get the lowest price that I think the competitor is going to bid.

Q. And you try to make that the same as the competitors?

A. Not necessarily. Sometimes we may want to quote lower than a competitor.

Q. Yes, but generally in destination prices, as you have told him yesterday,—you told him, didn't you, that you tried to quote at a destination price?

A. We try to quote a delivered price which we think is the market price at that particular point.

Q. Yes. Now, I want you to explain to the Examiner just why you do that? Why do you try to quote the same price as your competitor?

A. Well, I may think my cement is better than somebody else's, but I have difficulty in making the customer feel that way, and I can't get any more than somebody else is offering his cement for.

Q. Then as I understand it, Mr. Hill, your reason for quoting the same price as your competitors is not because of any agreement or understanding with your competitors—

A. No, sir.

Q. —but is because of the business necessity of selling at the same price that you expect the purchasers to buy for, is that a fair statement?

13263 A. That is correct.

Mr. MacIntyre: Your Honor please, that is certainly leading. What Mr. Leisure has asked in that question is: Now, you haven't entered into any agreement with your competitors, have you, on this business?

Mr. Leisure: Since Mr. MacIntyre suggests it, I will ask the witness that question now.

By Mr. Leisure:

Q. Have you, Mr. Hill?

Trial Examiner Norwood: Just a moment. Mr. MacIntyre's point is well taken.

Mr. McFadden: It is proper to lead on cross-examination.

By Mr. Leisure:

Q. Now, when you say, Mr. Hill, that you endeavored to get the lowest price, you mean by that that you did not try, you did not make any special effort to meet any highest prices; you are not interested in that, are you?

Trial Examiner Norwood: Now, I am going to instruct the witness not to answer that question and ask counsel not to lead him.

Mr. Leisure: May I know why?

Trial Examiner Norwood: Well, this is a member of the cement industry whose interests are identical with the respondents, and after considering the testi-
13264 mony and all the circumstances surrounding it, I don't think it is a case of where the respondent's counsel should put answers in his mouth.

Mr. Leisure: Well, of course, I have no intention of doing that at any time.

Trial Examiner Norwood: Well, bring out the facts.

Mr. Leisure: Even with a hostile witness, I wouldn't do that, but I do contend and I want to make it clear for the record that I so contend, that in cross-examination of a non-respondent witness, a witness that has been called by the government here for the purpose of producing evidence against the clients whom I represent, that I am entirely within my rights when I cross-examine him, and I can put suggesting and leading questions to him if I choose to do so on cross-examination.

Mr. Wooden: I contend that the rule is, that the question is whether the witness has an interest in the matter under consideration but is adverse to the party who is questioning. If his interests are not adverse, then that party cannot lead him. If his interests are adverse, he can be led, and I submit the witness' interests are adverse to the Commission's counsel and are thoroughly aligned with the interests of respondent's counsel.

13265 Trial Examiner Norwood: I don't think that the counsel should lead this witness.

13266 By Mr. Leisure:

Q. Now, Mr. Hill, when you attempt to meet these lowest prices which you have told the Examiner about, do you consider in meeting them you are quoting a competitive price, when you try to meet their lowest price?

A. Yes.

Q. It might be a considerable effort to you to meet a lowest price, might it not?

A. What do you mean by "effort"?

Q. Well, is there or is there not a fringe around your mill where there comes a time or there comes a place, rather, where it doesn't even pay you to try to quote the same prices—

A. That is true.

Q. —much less a lower price?

13267 A. That is very true.

Q. So that, to meet their prices in certain sections, might it or might it not be a considerable effort on your part to meet the lowest prices that you find?

A. Yes, sir.

Q. So that, as I understand you, the price—the fact that you quote the same price as your competitors doesn't mean that you do it by agreement at all?

Trial Examiner Norwood: Don't answer that question.

Mr. Leisure: May I know the grounds, your Honor, for the ruling?

Trial Examiner Norwood: Your question contains a suggestion of the answer.

Mr. Leisure: In other words, it is leading?

Trial Examiner Norwood: Yes, sir.

Q. Mr. Hill, will you tell me, in quoting the prices which you have just described, out to the fringe, to where you no longer can quote prices,—where you quote them at the same price as your competitors, will you tell the Examiner whether or not that is as a result of any agreement that you have entered into with your competitors?

A. We do not enter into any agreement with any of our competitors. We are thoroughly independent in

13268 everything we do.

Q. That is, will you tell him whether or not it is because you can't afford to sell at any different price? Is that the business reason?

A. I answered that just now pretty much, when I said I have never been able to get more for my cement than the other man for his cement.

13269 By Mr. Leisure:

Q. What I am really trying to get at in these questions, Mr. Hill, is this: What I wish you would explain to the Examiner is as to whether or not the facts, or rather, the fact that these prices are the same, whether you do or do not consider them competitive just the same?

A. I realize I must quote a competitive price to get business in my te itory.

Q. Precisely. In other words, if you were selling cement at $2.10 a barrel and you dropped it to $2.00 per barrel to meet a competitor's price, within your business

experience, would you consider that you were quoting a competitive price when you dropped it?

A. Yes, sir.

Q. And will you also tell us when such a thing occurs in your business experience, as to whether or not in your business you speak of such competition as being price competition, when you attempt to meet a competitor's price?

A. Yes, sir.

Q. And that is regardless of the fact that the prices are the same?

A. Oh, yes, sir.

Q. Now, Mr. Hill, as a practical business man,
13270 have you found that cement sells at standard prices, standard market prices?

A. Yes, sir.

Q. Is it a standard commodity which sells at a standard price?

A. Yes, sir, there is very little difference in the service that one company can give over the other.

Q. And do you mean by that that it sells at the same price, when you say standard price?

A. Yes, sir.

Q. And if you haven't made it clear already—I think you have, but if you haven't, will you make it clear to the Examiner, whether or not you mean by that at a given time and place one man could not have a different price in the same market and sell any cement?

A. No, he would have to have equal to the other man's to sell it, unless there was some friendship or something would enter into it that was not apparent.

Q. Now, have you always been free, Mr. Hill, to quote a higher or lower price than the standard price, if you saw fit to do so?

A. Yes, sir.

Q. And in spite of that fact are you selling cement at a standard price—at the standard price today, the market price?

13271 A. Generally so, yes, sir.

Q. And again, is that or is that not a result of any collusion or agreement on your part with the competitors?

A. Our actions are entirely independent of anybody else's. We quote what we want to whenever we want to.

Q. Now, will you tell the Examiner whether or not you have found, in your business experience,—whether or not the lowest price quoted over a period of time has eventually become the standard price?

A. That is what we consider the market price.

Q. And is that or is that not the way the regular market price in any community in which you sell is arrived at?

A. Yes, it generally seeks its level to the lowest price.

Q. Now, taking the example we just used a moment ago, could you continue to sell cement at $2.10 if the competitor sold at $2.00, was the way I put the question before. Will you explain to the Examiner what it is that forces you to sell at $2.00 instead of $2.10?

A. Our portland cement is a standard product, which is like sugar and we may think that ours is better than the other man's, but we can't make the customer believe it.

Q. In other words, the price competition of your competitors forces you to sell at the same price they sell,—is that a fair statement?

A. Certainly at not any more than they sell for.

13272 Q. Precisely. In attempting to quote destination prices that are as low as your competitors, as you have told us about, do you try to find out what your competitors have been quoting in the markets in which you wish to sell?

A. Yes, sir.

Q. And, as a matter of fact, you try to find out the destination prices at which cement is being sold in all these different markets?

A. Yes, sir.

Q. How do you do that? How do you ascertain these market prices?

A. Through our salesmen, through dealers. Whenever there is any change in price at a point made by a competitor, we learn it pretty quickly through salesmen picking up a quotation or a dealer telling us of a change in price.

Q. Do you do that as a result of any collusion or agreement with your competitors?

A. No, sir.

Q. Is it necessary for you to have that knowledge in order to successfully operate in the business?

A. Oh, yes.

Q. In which you are now operating?

A. Yes, sir.

Q. So that you do obtain that knowledge successfully?

A. Yes, sir.

13273. Q. Can you find that the base prices are by figuring them back, Mr. Hill?

A. We can generally do that, yes, sir.

Q. And you do do that?

A. Yes.

Q. You do it in that way?

A. Yes.

Q. After having found out what they are, do you ever write them down in any convenient form?

A. Oh, yes, sir.

Q. In such lists as the one referred to by Mr. Wooden as Exhibit 2366? Does your office keep such lists of basing points after you have figured them out?

A. Yes, sir.

Q. Does it save you any time to put them down, having figured them once, so you won't have to figure them each time you make a sale?

A. Yes, sir.

13274 Q. I think you have already explained that you make the effort of keeping this list up to date.

A. Yes, sir.

13276 Q. That is, when competitors do meet your lowest price, does it result over any period of time—does it bring about any appreciable increase in business?

A. When they meet our business, we are relatively in the same position as we were before.

Q. I thought that was the answer, but I wanted it in the record, Mr. Hill.

I think you testified that when Speed became a 13277 base in 1932, this reduced all of your mill nets? I think you said that yesterday.

A. Yes, I did, yesterday. There might have been a few points where it would not have affected. We may have had some contracts on hand at a certain figure that we did not reduce to that lowest price, but it affected all of our current market prices where we shipped.

Q. That is, it would lower your nets only where the Speed base was in operation; isn't that evident?

A. That is correct.

Q. And it would not lower your prices in markets where the price was not set by Speed, would it, Mr. Hill?

A. No, the effect of the base at any plant would not.

Q. So when you say all of your mill nets, you would have to confine it to those that were set by the Speed base?

A. Exactly.

Q. That is the correct statement, isn't it?

A. Exactly.

13279 Q. Mr. Wooden spoke yesterday of an incident in 1932 when the Lehigh Company, as he put it, imposed a base on your mill, and I think you said that they did not tell you about it before they did it; is that correct?

A. They did not tell me.

Q. I think you also said that prior to that you had cut a price in Indianapolis; is that correct?

A. Yes, sir.

Q. Then you said that the Lehigh Company sent out some quotations that appeared to be based on your mill after that; didn't you?

13280 A. Yes, sir.

Q. Is that how you found out that the Lehigh Company was quoting on your mill?

A. Yes, sir.

Q. When you cut your price in Indianapolis, the Lehigh Company could have found out—they could have found out at what price you were selling there; could they not?

A. They did find it out, apparently.

Q. Yes. And it was then that Lehigh sent out these quotations you have described to meet your competition?

A. I presume so.

By Mr. Zimmerman:

Q. What is the fact as to whether or not most of your business in marketing portland cement has been handled through dealers?

13281 A. Some of ours go through dealers and others direct to contractors.

By Mr. Zimmerman:

Q. Well, what about the proportions? Would you say that a larger percentage of it is sold through dealers or not?

A. That will vary in years according to whether we get many highway contracts of any volume.

Q. What has been the history of your business since you have been in it as to whether or not the dealers form the backbone of your business?

A. The dealer does form the backbone of our current business.

Q. Now, during the time that you were a member of The Cement Institute, if you will go back to that, you joined The Cement Institute when, please?

A. Shortly after the NRA went into effect.

Q. Well, to refresh your memory on that, that would have been possibly the summer of 1933?

A. I think it was just a month or two or three months after the NRA went into effect.

Q. And before the Code was finally adopted for the industry?

13282 A. That is correct.

Q. Your reason for doing it was what?

A. We wanted to cooperate in making the NRA work, the industry—

Q. In compliance with the appeal made by the President of the United States?

A. Yes, sir. The industry had decided to make The Institute a vehicle for developing a Code; and we wanted to cooperate in every way we could with NRA and we joined The Institute.

Q. The only way you could do that, in your opinion, was to join The Institute and take part in the Code conduct of affairs the same as all other persons and firms and corporations in the industry were doing?

A. That was the best way we knew of.

Q. Yes, sir.

A. To protect ourselves, too, in getting the benefits of the Code.

Q. And you remained a member of the Institute until you resigned in September, 1935, which was several months after the Code had gone out?

A. Yes, sir.

13283 By Mr. Zimmerman:

Q. During that period did you receive any service or any communications from The Institute which required you in any manner to conform to certain methods in marketing and selling your cement, except insofar as the code of ethics was concerned, or the unfair trade practices enumerated?

A. The Institute couldn't require us to do anything that—we operated under the Code, and that was handled

through the committee in charge of the Code. I have forgotten just what the tie-up was between The Institute and the Code at that time. We tried to conform with the Code, and sometimes we would get out of line, and we would be pulled up for getting out of line from the Code.

Now, just how closely that was tied into The Institute at that time, I don't know.

Q. Well, did it in any way change the method of selling and marketing and pricing cement that you had followed up to that time?

A. Not substantially.

Q. The fact of the matter is that since you have been in the cement business, there has been little, if any, change in the method of selling or marketing cement?

A. Generally speaking, the trade practices have been pretty well established for a number of years.

13286 Q. You do have your own freight rate book, do you not?

A. Yes, sir, for portland—the territory where we sell portland cement.

Q. Exactly. We are confining our examination now only to portland cement, please.

A. Yes.

Q. And you do have your own freight rate book, which has been carried on by you for how long, please?

A. Yes, sir.

13287 Q. How long has that been carried on, that practice?

A. I don't know, sir.

Q. Oh, I don't mean exactly. I mean approximately. How many years?

A. I couldn't answer that. Our traffic department has been keeping rate books there ever since I have been in the business.

Q. Well, that is what I wanted to develop. So long as you have had any knowledge of it, that practice has been the same?

A. Yes.

Q. And the only use that you have found it necessary to make of The Institute freight rate book is what, please? Explain that to us.

A. We use The Institute freight rate books mostly in helping us keep abreast of our competition in distant points where we have our sales of masonry cement, brixment.

Q. And where your freight rate book does not go to that much detail?

A. Exactly. Where we are not as conversant with the changes in the freight rates as we are nearer our plant where we sell portland.

Q. It relieves you to some extent, then, does it, from the examination of the railroad tariffs in all instances?

A. Exactly.

13289 Q. You do not publish any dealer policy, do you? I mean by that send it out to your trade in a written or typed form?

A. No, sir.

13291 Q. But have you at all times since you have been in the business of manufacturing and selling portland cement followed a policy as to whom you would sell directly and whom you would not sell directly?

A. Yes, but that is flexible.

By Mr. Zimmerman:

Q. State whether or not you find that information comes to you through your salesmen and through dealers from time to time as to how all of your competitors are selling, whether selling directly or indirectly?

A. That is the source of most of our information.

Q. And do you find that you can or cannot get along so independently as to sell on an entirely different basis than any competitor?

If that question is a little involved—

A. Yes, sir.

Q. —I will state it differently. What do you find

13292 as to whether or not you have to follow the lead of your competitors in meeting whatever competitive prices or arrangements that they make with the trade?

A. We try to meet whatever they make to the trade.

Q. Now, you do sell directly to State governments, do you not?

A. Yes, sir.

Q. And you sell directly to the government of the United States, do you not?

A. Yes, sir.

Q. Outside of that, what is the fact as to whether or not you sell through dealers where work originates or is confined to the limits of a city, town or village where you have a dealer?

A. We generally sell most of that business through dealers. Of course, large contracts might be sold directly to a contractor.

Q. Now, that means you do or do not sell directly to Emergency Relief agencies of the government where it is in the confines of a city, town or village where you have a dealer?

A. I am not right clear on that. I make those decisions, but I pass them down to the other sales to use, and I can't answer you definitely.

Q. Well, do you have any knowledge as to whether or not you ever sell to Emergency Relief agencies of the government where the delivery point is within the limits of a town or a city or village where you have a dealer?

13293

A. I am afraid my answer would not be worth a great deal because I am just hazy on those things.

Q. Well, give us your best information on that, regardless of the vaguenesss.

Q. I am referring to W. P. A. and things of that sort.

A. As a general rule, we try to market our material and certainly this W. P. A. cement through dealers.

Q. All right. Can you tell us, Mr. Hill, wherein, if at all, your methods of selling and pricing and marketing portland cement differ materially from what you know to be the methods and practices of your competitors?

A. I don't know. Sometimes I think we are a little different. I think probably the other fellow is a little smarter than us.

Q. Outside of that, state whether or not there is any difference in the method. I am not talking about results. I am talking about the method.

13294

A. We try to follow any trade practices put in by cement companies where it will help us to sell cement and is to our advantage to do so.

Q. And to keep abreast of the times and what they are doing, do you always have your salesmen make careful inquiry and promptly report to you any information that they may pick up in the field?

A. We do.

Mr. MacIntyre: We object to that as a leading question.

Trial Examiner Norwood: Read the question.

(Question and answer read.)

Trial Examiner Norwood: The objection is sustained and the answer stricken.

Q. Now, Mr. Witness, state whether or not it is a fact that you instruct your salesmen to go out into the territory and make careful inquiry as to what your competi-
13295 tors are doing in establishing any new practices and prices and promptly report it to you?

A. We do instruct them to do that.

13296 Q. All right. And what happened was that your competitor by putting that base on your mill, as you put it, actually met that price that you had made?

A. The price he made on our mill is the same net price that had been secured on that contract I sold at Indianapolis.

Q. So that the effect of it was meeting your price, is that right or not?

A. On that particular job, yes, sir.

Q. Yes. Well, now, state whether or not you have ever before cut a price or ever since cut a price?

A. I have cut them before and I have cut them since.

Q. And what do you find as to your competitors?

A. I find that they are cutting prices too.

Q. For how long has that been going on, to your knowledge, Mr. Hill?

A. Ever since I have been in the cement business.

Q. And right up to date?

A. Yes, sir.

Q. Right up to the present time?

A. Yes, sir. I say the present time; the recent six weeks or two months.

13297 Q. Yes. In other words, had there been anything to indicate that there is any stop going to be put to that practice in the industry?

A. No.

Q. When you find out that destination price, you try to get the lowest one that you can find, and then you figure the freight rate, as you said, and then what do you do with reference to adjusting your mill net so as to meet that destination price?

A. If I want the business at that particular point, I will have to meet the price that the other man has quoted.

13307 By Mr. Wooden:

Q. You have testified on cross-examination that when you make the same delivered prices at given des-

tinations you are competing as to prices. You did, didn't you?

A. Yes.

Q. Now, I am asking you whether when you cut the prices at a given destination you are competing as to price?

13308 A. We are competing with the business for that moment. It may not necessarily be price. It may be some other friendship, it may be some other advantage the shipper has over me, and I try to off-set those disadvantages that I have with sometimes a price concession.

Does that answer your question, sir?

Q. To a certain extent. As I understand your testimony, in response to Mr. Leisure's cross-examination, you say when different cement mills make the same destination price at a given destination, that is price competition?

A. Yes.

Q. I ask you what it is when they make different prices at the same destination.

Mr. Hershberger: I want to make the further objection that this is the same question he has asked at least ten different times.

Trial Examiner Norwood: Counsel doesn't seem to think he has had a satisfactory answer.

Mr. Leisure: Under the circumstances we appeal to the Examiner. We think it is clear the witness should not be obliged to adopt the exact phraseology that counsel uses.

Trial Examiner Norwood: If you appeal to me, I don't think he has received a direct answer up to this time.

The objection is overruled.

13309 By Mr. Wooden:

Q. I will pass on. Mr. Leisure asked you whether you had any understanding or agreement with competitors as a result of which you had the same destination prices as your competitors, and you said, "No." Would the prices delivered at given destinations have been any more nearly identical if you had had such an agreement?

Mr. Hershberger: I object.

Mr. Leisure: I object to that. It is argumentative and it calls for a conclusion of the witness. It does not attempt to bring out any facts.

Trial Examiner Norwood: Read the question.

(Question read)

Trial Examiner Norwood: I think that is argumentative. The objection is sustained.

By Mr. Wooden:

Q. All right. I believe you said in reply to a question of Mr. Zimmerman's that selling on a delivered price basis enabled you to reach out into wider territory, is that right?

A. When I answered that question I felt at the time that I was not—I did not convey probably the meaning that I wanted. What I intended to say then was—I have lost the trend of the question.

Trial Examiner Norwood: Read the question.

Mr. Wooden: There isn't any question.

13310 Trial Examiner Norwood: Well, read him what he said.

The Witness: I just lost the trend of it.

(Question and answer read)

A. What I meant is that by selling at delivered prices we could meet and absorb freight and go beyond any basing point of our plant.

By Mr. Wooden:

Q. Does that mean you could take lower mill nets by going into a wider territory?

A. Yes, sir.

Q. Doesn't that mean that your average mill net had to be higher to enable you to go into that wider territory?

A. Very correctly so.

Recross Examination by Mr. Zimmerman.

Q. Approximately what is the productive capacity of your mill of portland cement? We want to get some idea of how large it is.

A. About one and three-quarter million barrels.

Q. A year?

13311 A. Yes, sir.

Redirect Examination by Mr. Wooden.

Q. Showing you Exhibits 971-5D and -5E and 971-17N and -17O, do you recognize those as letter of your company?

(Handing documents to witness)

A. I recognize those as the signature of our secretary and treasurer, Mr. Henry S. Gray.

Q. In both cases?

A. Yes, sir.

13312 O. H. D. ROHWER was thereupon recalled as a witness for the Commission and, having been previously duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

The witness identified Com. Ex. 1946 as a communication between a traffic manager at Birmingham to our sales manager at Waco. The witness knows Mr. Bradley, the traffic manager. That is his initial. "This" is a communication referring to Com. Ex. 1937 from our sales manager at Waco to our salesman at Houston, Texas.
13313 He does not recall having seen it; Com. Ex. 1938 is evidently a communication from our salesman—to his recollection he has not seen the paper. "We" have a George D. Smith in our organization. Smith at that time was our salesman at Houston, Texas. He is now our service bureau manager at Waco, Texas. We did have a man in our employ by the name of J. C.
13314 Bradburn. He is no longer with us. He was with us in June 1937.

By Mr. Leisure:

Q. I am showing you, Mr. Rohwer, Commission's Exhibit, for identification, 1946; and I would like to ask you if you ever saw the exhibit before it was shown to you? Did you see it at the time?

(Handing document to witness.)

A. I did not see it at the time.

Q. And that is a typewritten statement so that you don't know of your own knowledge who wrote it, do you?

A. No, sir.

Mr. Leisure: Your Honor, I object to this exhibit as incompetent, irrelevant and immaterial, and my principal objection is that when letters are offered in evidence, there should be an effort on the part of the Commission to offer the author of the letters for cross exam-
13315 ination, because here is a statement that contains the words "agreed practice." Now, clearly, if the

witness who wrote the letter were here on the stand and produced under the ordinary rules of evidence, we would have the opportunity of asking him what he meant by that; but if a practice is followed by just offering letters, regardless of whether the author is on the stand or not, it means we have to follow up and go through the record on all of the exhibits and call all the witnesses, on which the burden should not be placed on us. For those reasons I object to this offer.

Trial Examiner Norwood: You object to the identification?

Mr. Leisure: Well, the witness said, in response to my question, that it was a typewritten signature and he could not identify it and had not seen it at the time it was written.

Trial Examiner Norwood: Yes.

Mr. Leisure: To answer Your Honor's question, yes, we do object.

Mr. Zimmerman: May I see them?

(The documents referred to were handed to counsel.)

Trial Examiner Norwood: Any further objections?

Mr. Wooden: I would like to say, in response to Mr. Leisure's statement, that when a document is once
13316 properly identified as a statement of a party to the case, it is not required to call the party who prepared that statement.

Mr. Hershberger: Just a minute, please.

Trial Examiner Norwood: Certainly.

(A short interruption.)

13317 Trial Examiner Norwood: Any further objection?

Mr. Leisure: Yes, Your Honor. I would like to make the further objection to the carbon copies, 1938 and 1937, on the ground that they are incompetent, irrelevant and immaterial, and, particularly, I want to call Your Honor's attention to the fact that they do not relate to any of the issues, the substance of the two letters do not relate to any of the issues in the case.

Trial Examiner Norwood: I think you will have to identify these further unless the counsel will stipulate.

Mr. Wooden: Do I understand that Mr. Hershberger has no objection?

Mr. Hershberger: I have no objections to it, as far as I am concerned.

Mr. Wooden: These are papers from the files of the Universal-Atlas Company.

Mr. Leisure: If Mr. Hershberger has no objection, I withdraw my objection.

Trial Examiner Norwood: Received by agreement as marked.

(COM. EXS. 1937, 1938 and 1946 were offered and received in evidence.)

13318 By Mr. Wooden:

Q. Mr. Rohwer, I am showing you Exhibit 971-31V and -31W. Is that a letter that was prepared for you, and is your name signed to it with your authority?

A. That is signed by Mr. Scovel. I have nothing to do with it and have never seen it.

Q. Mr. Scovel had authority to sign your name?

A. I can't tell you that.

Q. To letters of various kinds?

Trial Examiner Norwood: You recognize the handwriting?

The Witness: Yes, it is Mr. Scovel's handwriting.

By Mr. Wooden:

Q. In other words, it is your name in the handwriting of Mr. Scovel; is that right?

A. That is right.

Q. Did Mr. Scovel have authority to sign your name on some occasions?

A. On some occasions, he did.

Q. Outgoing letters?

A. Yes, sir.

Q. Can you tell me whether or not the Buffington mill of the Universal-Atlas Company, or, rather, whether your company provided or furnished to Professors Clark and Burns the data for the Buffington mill showing the

13319 net returns during the selected months that were indicated in the questionnaire?

A. I know nothing about that.

By Mr. Wooden:

Q. Who would know?

A. Mr. F. L. Stone.

Q. Are you familiar, Mr. Rohwer, with the way in which your company pays its state sales taxes in various states?

A. I am not familiar with the details of that.
Q. To what extent are you familiar with it?
A. That is all handled by Mr. Lindahl, our auditor.
Q. Do you know in a general way how it is done?
A. No, I have never gone into that.

Mr. Wooden: Your Honor, before excusing Mr. Rohwer, I want to offer at this time Exhibit 1942-A to E, inclusive, for identification. It was identified yester-
13320 day by Mr. Scovel at pages 13127 and 13128 of the record, but I believe it was not offered.

Mr. Leisure: Is that the one that he produced from his office in the afternoon?

Mr. Wooden: No, I think that was one that Mr. Lindahl brought in as the Texas version of the method of marketing.

Mr. Leisure: But Mr. Scovel did identify it as being one from his office?

Mr. Wooden: Mr. Lindahl produced it under a subpoena. Then Mr. Scovel identified it as being one that they had used in Texas and sent out in Texas.

Mr. Leisure: I have no objection.

Mr. Wooden: Nothing further of Mr. Rohwer.

(COM. EX. 1942-A to E was offered and received in evidence.)

13321 HOWARD MILLER, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. MacIntyre.

I am treasurer and assistant secretary of the Trinity Portland Cement Company and have seen so engaged with the Trinity since the first part of 1933. I do not hold any other position with that company. I am secretary
13322 and treasurer of the Cowham Engineering Company and have been with that company since the fall of 1925. I began with the Cowham Engineering Company at that time as an accountant. The accounting work has been under my supervision ever since I have
13323 been with the company. I became secretary and treasurer of the company approximately 10 years ago and have continued in that position since then. I am

secretary and treasurer of the Florida Portland Cement Company and have held that position since about 1930. I am secretary and treasurer of the Consolidated Cement Corporation since 1926 and assistant secretary and assistant treasurer of the Signal Mountain Portland Cement Company since approximately 10 years ago.

Q. Mr. Miller, did your subpoena under which you appear here today call for your production of any documents?

A. It did.

13324 Q. Did you produce the documents called for?

A. I have them here. If I may take this just a second, Your Honor.

Trial Examiner Norwood: Yes.

(The document referred to was handed to the witness.)

A. (Continuing) The documents called for are all here. I would like to call attention to this item (indicating), which calls for a memorandum from J. F. Hayden to F. P. Harder, Shreveport, carbon copy to Chicago, dated Dallas, January 24th, 1935. The date of that document is January 23rd, 1935, and we assumed it is the same document, but I call your attention to the difference in date.

By Mr. MacIntyre:

Q. All other documents as described in the subpoena are produced by you and are in this group here? (Indicating.)

A. Well, these are photostatic copies of the documents.

Q. Well, that is what I mean.

A. That is right.

Q. They are photostatic copies of the documents called for in the subpoena?

A. Yes.

13326 By Mr. MacIntyre:

Q. Now, Mr. Miller, I believe you stated that you had produced as one of the documents called for under the subpoena a memorandum from J. F. Hayden to Mr. F. P. Horger, Shreveport, carbon copy to Chicago, dated at Dallas, January 24, 1935.

Now, you have stated that you have produced that, produced it as bearing the date of January 23, 1935. Now, I show you a document marked as Commission's Exhibit,

for identification, 2367, and ask you to state whether or not that is the document to which you made reference?

A. That is the one.

Q. Now, I hand you documents marked, for identification, as Commission's Exhibits 2367 to 2379, inclusive, and ask you to state whether or not they are the documents that you produced here in response to your subpoena duces tecum?

A. They are.

Q. Mr. Miller, I am showing you from that group a document marked, for identification, as Commission's Exhibit 2371-A and B.

I ask you to state whether or not you recognize the signature at the end of that letter, and, if so, as whose?

A. Well, I can—I can guess whose signature it is, but I—

13327 Trial Examiner Norwood: Well, state.

The Witness: Well, it is C. E. Ulrickson, vice president.

By Mr. MacIntyre:

Q. Of the Trinity Portland Cement Company?

A. Trinity Portland Cement Company.

Q. Of which you are secretary and assistant treasurer?

A. That is right.

Q. You are acquainted with Mr. Ulrickson's signature as a result of your duties in the capacity of secretary and assistant treasurer of the Trinity Portland Cement Company?

A. Well, I have seen Mr. Ulrickson's signature, but when I was made treasurer and assistant secretary of this company Mr. Ulrickson lived, I think, only about a year after that, and my duties and my association with him were very few. As a matter of fact, I was in Chicago, and he was in Texas.

Q. Did you ever, during that one year, have passed through your hands checks drawn against the company for the payment of his salary and other expenses?

A. I don't recall having seen any. There would be no occasion.

Q. In other words, in your duties as secretary and assistant treasurer, it was your duty to handle papers, vouchers or otherwise signed by other officials of the company?

A. Yes, it was in my duty, and so far as that
13328 signature is concerned, I would say that it looks like Mr. Ulrickson's signature.

Q. Now, I call your attention to the receipt stamp appearing on the document marked, for identification, as Commission's Exhibit 2371-A, and ask you to state whether or not you recognize that as the receipt stamp of your office?

A. Well, it looks like the receipt stamp that is used in the Cowham Engineering Company office.

Q. What about the handwritten initials "J. L. S." appearing within that receipt stamp? Do you recognize in whose handwriting those initials appear?

A. It looks as though it was Mr. Senior's initials.

Q. And who is Mr. Senior?

A. Mr. John L. Senior is the president of the Cowham Engineering Company. He is—

Q. Have you in connection with your duties as treasurer and assistant secretary of the Trinity Portland Cement Company become acquainted with Mr. Senior's signature?

A. Yes.

Q. And handwriting?

A. Yes.

Q. What can you say as to the identification of the other initials below the receipt stamp in the righthand margin on that same document?

A. Well, the first one has the initials "J. L. S."
13329 and the second one is "S. W. S." and they are probably the initials of these gentlemen placed there by one of the clerks.

Q. Well, do you recognize in whose handwriting they appear?

A. I wouldn't be sure.

Mr. MacIntyre: If your honor please, we now offer in evidence this document marked as Commission's Exhibit, for identification, 2371-A and B, and inquire as to whether or not counsel, Mr. McPherson and Mr. Schofield, representing the Trinity Portland Cement Company and the Cowham Engineering Company—ask whether or not they will stipulate that that document as well as the other documents which were produced by this witness under subpoena here today are what they purport to be as has been stipulated by them in another proceeding recently.

Mr. McPherson: I will consider it and let you know.

Trial Examiner Norwood: Well, it can be held over.

Mr. MacIntyre: It is a matter of saving time. We can add that the identification, we believe, has already been supplied, but if we can save the few minutes additional it would be necessary to go through with it, it would save some additional motions here.

Trial Examiner Norwood: All right.

13330 Mr. Leisure: As to this letter, Mr. MacIntyre, we have examined it. This is a letter from his company, and he can identify it, so as to that you don't need to hold it over until tomorrow.

Trial Examiner Norwood: All right.

Mr. McPherson: We will stipulate to that.

13331 (COM. EX. 2371-A and B was offered and received in evidence.)

13334 By Mr. MacIntyre:

Q. Mr. Miller, have you, since you have served as an official of the Trinity, the Cowham, the Florida Portland Cement Company, the Consolidated and the Signal Mountain had associated with you as an officer of any one of those companies at any time a man by the name of Ben W. Calvin?

A. Yes, Mr. Calvin was at the Peninsular plant

13335 of the Consolidated Cement Corporation.

Q. During what period?

A. I don't remember when he was employed by the company, but he left our employ about the middle of 1936.

Q. Well, can you approximate the period coming down to 1936 that he was with your company at that place, that is, the Peninsular plant? Was it a matter of three years or four years or five years or just how many years, in your recollection?

A. No, it was a longer period than that. I am just guessing, but I would say that it was probably—that he was probably with the company for eight or ten years.

Q. For a period of some eight to ten years—

A. That is right.

Q. —prior to 1936?

A. That is right.

Q. Did you in connection with your duties as secretary and treasurer of the Consolidated Company handle checks and vouchers, or other papers that came into your office

from the office of Mr. Calvin, bearing his handwriting and signature?

A. I have seen his signature on letters and communications.

Q. Over that period that he was employed?

A. That is right.

Q. And in what capacity was he employed at the
13336 Peninsular plant of the Consolidated Portland Cement Company?

A. He had the title of sales director.

Q. Sales director. Mr. Miller, I now show you documents which have been marked, for identification, as Commission's Exhibits 1081-U and 1081-F, and ask you to state whether or not you recognize the initialed signatures at the bottom of each of those as the signature of Mr. Ben W. Calvin.

(Handing documents to witness.)

A. Well, the "B. W. C." looks like it might be Mr. Calvin's initials.

Q. They appear in his handwriting, judging from your experience in looking over his handwriting and signature for that number of years?

A. Yes, I would say the initials look like his handwriting, from my recollection of communications signed by him.

Q. What can you say as to the receipt stamps on those two documents? Do you recognize those stamps as the stamps of your office here in Chicago?

A. Well, of course the stamps can be bought at any stationery store where this one was bought, but I would say it looks like the stamp we used in our office.

Q. Well, do you find any difference in that stamp from the ones you do use in your office?

A. No.

Q. What about the initials, that is, the handwrit-
13337 ten initials appearing in the stamp on 1081-U, do you recognize the handwriting at that place?

A. There is only one initial. I am not sure that it is an initial. It is here below this date mark, but I don't recognize it.

Q. What about the pencilled handwritten numerals for a date, 5-23-30, do you recognize in whose handwriting those appear to be?

A. I do not.

Q. Now, as to 1081-F in the upper right—near the upper right corner appear in handwriting the words "Filed Cement Inst." underscored. Can you tell in whose handwriting those words appear?

A. No.

Q. Mr. Miller—

Mr. Leisure: I thought you were going to offer those. If you are not going to offer them, may I see them?

Mr. MacIntyre: Certainly, you may see them.

(Handing documents to counsel.)

Mr. Hershberger: That is 1081-U and F?

Mr. MacIntyre: Yes.

By Mr. MacIntyre:

The Cowham Engineering Company was incor-
13338 porated as a Delaware Corporation in 1922, and it is a Delaware corporation. The Trinity Portland Cement Company is a West Virginia Corporation and was incorporated either in 1908 or 1909. The Florida Portland Cement Company is a Delaware corporation, incorporated in either 1925 or 1926. Consolidated is a Delaware corporation, and was incorporated in 1926. The Signal Mountain
is a Delaware Corporation, and I think it was incor-
13339 porated in 1923. The officers of the Cowham Engineering Company are John L. Senior, President; Howard Miller, Secretary and Treasurer, and A. E. Hjerpe, Vice President. The directors are John L. Senior, Howard Miller, M. C. Senior and A. E. Hjerpe. The officers of the Trinity Portland Cement Company are John L. Senior, President; S. W. Storey, Vice President; J. F. Hayden, Vice President; R. N. Cowham, Vice President; R. T. Gunderson, Secretary; Howard Miller, Treasurer and Assistant Secretary. The directors are John L. Senior, R. M. Cowham, S. W. Storey, Howard Miller, R. N. Cowham. The officers of the Florida Portland Cement Company are President, John L. Senior; Vice Presidents, S. W. Storey, F. M. Traynor or Trayner, I forgot which; Secretary and Treasurer, Howard Miller. The directors are John L. Senior, S. W. Storey, Howard Miller, John W. Esmond,
J. P. Hoskins, W. A. Sadd, L. H. Caldwell, E. J.
13340 Trimbey, H. T. Lykes, J. A. Griffin. The officers of the Signal Mountain Portland Cement Company are President, John L. Senior; Vice Presidents, L. H. Caldwell and S. W. Storey; Secretary and Treasurer, J.

P. Hoskins. The directors are John L. Senior, L. H. Caldwell, S. W. Storey, Howard Miller, J. P. Hoskins, W. A. Sadd, J. H. McPherson, E. J. Trimby, F. A. Carter, R. J. Fischer, Jr., C. L. Hardwick, R. J. Wright.

Q. Now, will you please state whether or not the Consolidated Portland Cement Company has been in receivership at any time within recent times, Mr. Miller?

Mr. Leisure: I object to that. I don't think it is material to any of the issues whether it has been or not.

Mr. MacIntyre: If your Honor please, I am attempting to save time here, and I just wanted to fix that as a date, so that we may get the names of these officers on one side or the other of the date of the receivership, so that we may be able to compare them. We are not otherwise interested.

13341 Mr. Leisure: If it only goes to that question, I have no objection.

Trial Examiner Norwood: Answer the question.

The Witness: May I hear the question again?

Trial Examiner Norwood: Read the question.

(Question read.)

By Trial Examiner Norwood:

Q. And if so, when?

The Consolidated Portland Cement Company was in receivership in 1931 and was reorganized under Section 77B of the National Bankruptcy Act as amended, and the new corporation or the reorganization dates from, I think, May 1, 1934. Since the reorganization, the officers of the Consolidated Cement Corporation are: S. W. Storey, President; Stanley G. Stewart, Vice President; A. E. Hjerpe, Vice President; Howard Miller, Secretary and Treasurer. The directors are John L. Senior, S. W. Storey, Stanley G. Stewart, W. D. Pratt, Hamilton Allport, A. E. Swanson; I am not sure about Mr. Hurley's initials, I think it is L. G. Hurley; W. B. Prickitt; Mr. A. Z. Patterson; no, it is Raymond G. Hurley; Charles H. Bliss.

13342 Q. Now, Mr. Miller, I will ask you to state whether or not there is any substantial difference in the—I mean as to the personnel in the officers and directors of Consolidated today as compared with the period previous to 1935, and if so, state the difference?

13343 Mr. Leisure: I think we are spending time unnecessarily on that kind of question. I don't know that it makes the slightest difference.

Trial Examiner Norwood: I think the question is a short cut.

Mr. Leisure: I mean the evidence itself, I don't think it is material.

Mr. Hershberger: Whether it is or not, it certainly couldn't be any evidence of any collusion of the Universal-Atlas Cement Company, it seems to me. What has it got to do with it?

Trial Examiner Norwood: I can't say.

Go ahead. Objection overruled.

Mr. MacIntyre: May we have the answer of the witness to that question?

Trial Examiner Norwood: Read the question.

(Question read as follows: "Mr. Miller, I will ask you to state whether or not there is any substantial difference in it, I mean, as to the personnel in the officers and directors of the Consolidated today as compared with the period previous to 1935, and, if so, state the difference.")

Trial Examiner Norwood: Answer the question.

A. Well, I am simply trying to remember. I
13344 might have to give it to you piecemeal. Mr. Senior, prior to 1931, was the president; I was the secretary and treasurer; I think Mr. Storey was a vice president.

As to the directors, of course, Mr. Senior was then and is now a director, and, likewise, Mr. Bliss, also Mr. Pratt and that is about as far as I remember, except that Mr. Swanson and Mr. Hurley and Mr. Patterson and Mr. Prickitt are new.

By Mr. MacIntyre:

Q. On the board of directors since 1935?

A. Since 1931.

Q. They have been on the board since 1931?

A. No, they haven't. They were on the board after the company was reorganized under Section 77B.

Q. It was operating in 1931 to 1935 under a receiver?

A. That is right.

Q. Who was the receiver?

A. A. B. Hoffman, Albert B. Hoffman, and S. W. Storey, and Stanley G. Stewart was an ancillary receiver in Kansas.

Q. Was Mr. Hurley at any time connected with the receivership, as a receiver?

A. Never.

Q. With respect to the board of directors of the Cowham Engineering Company, there is the name of M. C. Senior. Is that Maude C. Senior?

13345 A. Maude C. Senior.

Q. Maude C. Senior?

A. That is right.

Q. Can you state whether or not there is any relationship between her and Mr. John L. Senior?

A. Husband and wife.

13360 Q. Mr. Miller, I will ask you to state whether or not with respect to these five corporations about which you have been testifying, will you state whether within your knowledge the officers and board of directors of each of those corporations own a controlling stock in the voting stock in their respective corporations?

A. Just to get that clearly, may I have the question read?

Trial Examiner Norwood: Yes, read it.

The Witness: There was some confusion as you started.

Mr. Leisure: And I want to record an objection to that question, that it is incompetent, irrelevant and immaterial, does not prove or tend to prove any of the issues in this case.

Trial Examiner Norwood: The objection is overruled. Will you read the question?

(Question read.)

By Mr. MacIntyre:

Q. (Continuing.) —of which they are officers and directors?

A. Well, you mentioned five companies. That includes four cement companies and the Cowham Engineering Company.

Trial Examiner Norwood: Yes.

13361 A. Now, with respect to the officers and the directors of the Cowham Engineering Company and their ownership of Cowham Engineering Company stock.

By Mr. MacIntyre:

Q. That is the question exactly. Do they own a controlling interest in the voting stock in that corporation?

Trial Examiner Norwood: The objection is overruled.

A. Am I supposed to answer?

Trial Examiner Norwood: Yes, go ahead and answer.

A. Well, Mr. Senior owns the stock of the Cowham Manufacturing Company.

By Mr. MacIntyre:

Q. In its entirety?

A. That is right.

Q. All right. Now, what about the ownership
13362 of the voting stock, the control of the voting stock of the Trinity Portland Cement Company, can you state whether or not that is owned by the officers and the board of directors of that company or any one of them?

Mr. Leisure: May I have the same objection to that question, please?

Trial Examiner Norwood: Yes, sir. The objection is overruled.

A. Your question is whether the officers and directors of the Trinity Portland Cement Company own the controlling interest of the Trinity Portland Cement Company?

By Mr. MacIntyre:

Q. More than 50 per cent of the voting stock? Will you state whether or not they own 50 per cent or more?

A. I don't think they do.

Q. Well, will you please state whether or not within your knowledge they do or do not own it?

Mr. Hershberger: I think he answered that.

Trial Examiner Norwood: I think he said he didn't think so.

By Mr. MacIntyre:

Q. Well, what portion of the total voting stock do the officers and the board of directors of that corporation own of its voting stock?

13364 A. Well, I can't answer the question as to what percentage of the stock they own, and that was the question, wasn't it?

Mr. MacIntyre: Yes, sir.

Trial Examiner Norwood: Now, how many shares do they own?

By Mr. MacIntyre:

Q. What percentage of the stock does Mr. John L. Senior own of the Trinity Portland Cement Company, voting stock?

A. I can't answer that question.

Q. You mean to say you don't know?

A. That is right.

Q. Now, Mr. Miller, will you state whether or not the officers and the board of directors of the Florida Portland Cement Company own a majority of the voting stock in that corporation?

Mr. Leisure: We make the same objection.

Trial Examiner Norwood: Yes. Objection overruled.

A. First, I must ask you what you mean by ma-
13365 jority, because there seems to be some confusion.

Mr. Wooden said a lesser percentage than 50 per cent might be a majority, so I don't know what you would call it.

Trial Examiner Norwood: I don't think he said that. I think he said it might be controlling.

The Witness: Oh.

Mr. MacIntyre: There is a difference in the word "majority" and "controlling" as used here.

By Mr. MacIntyre:

Q. I am asking about majority now, which, of course, would be more than half.

A. Well, will you let me make this explanation. Now, you are speaking of the Florida Portland Cement Company. That company has five officers and ten directors, and I know that some of the directors are people who own substantial stock in the company, but they probably would not be directors if they didn't have an interest, a financial interest in the company. Now, as to whether all of those officers and directors own a control of the company is a matter of fact which I can't answer, because I don't know the answer. I don't know what percentage. I have never had occasion to satisfy my curiosity on that point.

Q. In other words, you say you do not know at this time whether or not those officers and directors do in the
aggregate own more than 50 per cent of the voting
13366 stock in that corporation?

A. I do not.

Q. Well, I will ask you the same question with respect to the Consolidated Portland Cement Company.

Mr. Leisure: I make the same objection.

Trial Examiner Norwood: Objection overruled.

A. Well, in connection with the Consolidated Cement Corporation, all of the voting stock is in a voting trust and there are seven voting trustees.

By Mr. MacIntyre:

Q. And who are they?

A. There is Mr. W. D. Pratt, Mr. A. E. Swanson, Mr. John L. Senior, Mr. Hamilton Allport, Mr. Charles Bliss, Mr. Raymond G. Hurley and Mr. W. D. Prickitt.

Q. Now, Mr. Miller, I will ask you to state whether or not the officers and the board of directors of the Signal Mountain Portland Cement Company, to your knowledge, in the aggregate own a majority of the voting stock
13367 in that corporation?

Mr. Leisure: We make the same objection.

Trial Examiner Norwood: The objection is overruled.

A. Well, my reply would have to be the same as it was in connection with Florida. Some of the directors, especially those residing in Tennessee, are substantial stockholders, and any answer that I might make would simply be a guess.

By Mr. MacIntyre:

Q. Now, Mr. Miller, will you please state what you know concerning the functions and relationships of the Cowham Engineering Company with respect to the Trinity Portland Cement Company, the Florida Portland Cement Company, the Consolidated Cement Corporation and the Signal Mountain Cement Corporation?

What relationship, say, begin first with the Trinity Portland Cement Company, exists between the Cowham Engineering Company and the Trinity Company?

A. Well, the Cowham Engineering Company furnishes a management service to the Trinity Portland Cement Company. We supervise the operation of the plant and properties in the manufacture of cement.

Q. Have anything to do with the management of the sales?

A. Yes.

A. Of cement?

13368 A. Yes, we direct the policies of the company.

Q. What can you say in that respect as to the relationship of the Cowham Engineering Company and the Florida Portland Cement Company?

A. I would say the relationship is the same.

Q. What about the Cowham Engineering Company and the Consolidated Cement Corporation? Would the

relationships be the same as in the case of the Florida and the Trinity Company?

A. What two companies did you name last?

Q. Well, we will take the Signal Mountain Portland Cement Company and the Cowham Engineering Company. Would the relationship of those two be the same as the relationship of the Trinity and the Florida with the Cowham Engineering Company?

A. You are asking what the relationship of the Cowham Engineering Company is with the Cowham Engineering Company?

Q. No, with the Signal Mountain Portland Cement Company.

A. It would be the same as it is with the Florida and Trinity, and I might add this, that the management services that we perform are under the direction or supervision or approval of the boards of directors of those companies, subject to their approval.

Q. Now, what relationship exists between the Cowham Engineering Company and the Consolidated Cement Corporation?

13369 A. The same relationship, that of managing the company's properties.

Q. And sales of portland cement?

A. That is right.

Q. Now, will you state whether or not, to your knowledge, the Trinity Portland Cement Company has a membership in The Cement Institute or has had?

A. It has in The Cement Institute.

Q. What about the Florida Portland Cement Company?

A. It has a membership.

Q. What about the Signal Mountain Portland Cement Company?

A. It has a membership in The Cement Institute.

Q. What about the Consolidated Cement Corporation?

A. It has a membership.

Cross Examination by Mr. Leisure.

13370 Q. Now, as to these different companies, are they located in a single geographic district or are they scattered over the country so that they are competitors of the other companies?

A. No, they are scattered. They are in different states, as a matter of fact.

Q. So that each one of the four companies market in a totally different area from the other?

A. That is right.

Q. Comparatively speaking, each of these companies are small companies, they are not large comparatively speaking, are they, Mr. Miller?

13371 A. No, they are not large companies.

Q. Do you know when these companies joined The Cement Institute?

A. The Cement Institute?

Q. Yes.

A. About the middle of 1933—

Q. In other words—

A. —June, I think.

Q. In other words, do you know whether or not they joined during the Code period?

A. Was the Code period,—when was the Code period?

Q. Well, I mean the N. R. A.

A. Well, I know that the Florida Portland Cement Company and the Consolidated Cement Corporation and the Signal Mountain Portland Cement Company were members of the Institute in 1930, just for that year.

Q. For that year?

A. And then they rejoined about June, 1933, and are members now.

Q. They rejoined then, did they not?

13372 A. That is right.

Q. All of them during the N. R. A. period?

A. All with the exception of Trinity, and I don't think it was a member in 1930, so that it would not have rejoined in 1933.

Redirect Examination by Mr. MacIntyre.

Q. Mr. Miller, you stated that these plants of these four operating cement companies are located in different sections of the country. Will you please name the location of the plants of the four companies?

A. The Florida Portland Cement Company plant is located at Tampa, Florida. The Signal Mountain Portland Cement Company plant is located at Chattanooga, Ten-

nessee. The Trinity Portland Cement Company has three plants, one located at Fort Worth, Texas, one just outside Dallas, Texas, and one at Houston, Texas. The Consolidated Cement Corporation has a plant at Fredonia, Kansas, and one at Cement City, Michigan.

Q. Can you tell us what the aggregate productive capacity of all of those plants amounts to in terms of millions of barrels of cement annually?

A. About seven to eight million barrels, all of the plants together.

13373 Q. In total amount to about eight million. Now, you said, I believe in response to a question from Mr. Leisure, that these plants were not in the trading territory of each other. I will ask you to state whether or not within your knowledge the Signal Mountain plant at Chattanooga, Tennessee, sells into any common territory with the Florida Portland Cement Company, that is, in southern Georgia and Alabama?

A. I woulnd't know that. That wouldn't be in my province.

Q. What about the shipping territories of the Fredonia plant of the Consolidated Cement Corporation and that of the Trinity Portland Cement Company, the northeastern Texas plant?

A. I wouldn't know of any overlapping.

Q. Well, you don't mean by your statement or you didn't mean by your statement a few minutes ago that there is no overlapping? You mean you do not know or haven't any knowledge of any overlapping?

A. That is right.

13374 JAMES MC KEAG, was recalled as a witness for the Commission and testified further as follows:

Direct Examination by Mr. Wooden.

The witnesses was shown papers marked, for identification, Com. Ex. 2380 to 2384, inclusive. The 13375 witness said these first four papers are copies of original documents which he received from Mr. Sippey, assistant sales manager of Pittsburgh Plate Glass Company of Pittsburgh on November 18, 1936. Com. Ex. 2384 is an original document which he handed to the wit-

ness at the same time. "Those" were copies of papers which the witness selected from his files, and asked [that] copies to be provided the witness. Those are the copies taken from the originals which were taken from his files; Com. Ex. 2385 A to G as an original document consisting of all of these pages, which the witness received from Con Hearn on November 17, 1936. Mr. Hearn was sales manager of the Superior Cement Company at Portsmouth, Ohio. Each one of these papers contains identifica-
13376 tion marks of the witness' signature and all the penned writing is his own handwriting, placed on "those" papers within two or three days after he received them.

Cross Examination by Mr. Leisure.

Q. This paper, 2385-A to G, is this the paper that you got from Mr. Hearn?

A. That is it.

Q. Or did you return a copy?

A. No, that is the original document that he gave me.

Q. And the other papers were obtained from the same source, 2380 to 2384, and by the same source, I mean they came from the same individual at the Pittsburgh Glass Company?

A. All of them from Mr. Sippey.

Q. And I understood you to say that Mr. Sippey was connected with the Pittsburgh Plate Glass Company?

A. He was assistant sales manager.

Q. The last time you were here, Mr. McKeag, I believe you said you took certain documents and were to
13377 make copies and return them?

A. From—I believe that was from the Diamond Portland Cement Company, as I recall it.

Q. Did that apply to your investigation of Mr. Hearn's files also?

A. No.

Mr. Leisure: I don't think there is anything futher, your Honor.

13378 *Redirect Examination by Mr. Wooden.*

Q. Did you have any understanding with either Mr. Sippey or Mr. Hearn that any of the papers that they provided you with should be returned?

A. None of those or either one of them.

JOHN H. BASS was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am an Attorney-Examiner for the Federal Trade Commission, having occupied such a position about fif-
13379 teen years. I am in the Chief Examiner's Division of the Commission. I have been attached to the Chicago office. In the course of my official duties, in the Fall of 1936, I had occasion to make an investigation into the conditions in the cement industry.

Q. In a general way, how did you carry on that investigation?

A. Well, I called upon the officials of the various cement companies, held interviews with them, and in a number of instances I examined documents in their possession.

Q. Did you obtain their copies of documents or the documents themselves at times?

A. Yes, both, both the copies—the originals and copies.

Q. In the course of that inquiry, did you call upon Mr. Tyler of the Dewey Portland Cement Company?

A. I did.

Q. What position did Mr. Tyler occupy with the company?

A. Oh, you are referring to F. E. Tyler?

Q. The one you talked with.

A. All of them were present, but F. E. Tyler was
13380 president of the Dewey Portland Cement Company.

Q. Did you see him, deal with him?

A. Yes.

Mr. Wooden: Give these the next numbers, please.

(The paper writings referred to were marked "Commission's Exhibits 2386 and 2387," for identification.)

By Mr. Wooden:

Q. Will you state, Mr. Bass, whether you have seen the papers I now show you marked as 2386 and 2387, for identification, and, if so, where did you first see them?

A. Yes, sir; I saw those. Exhibit marked, for identification, 2386 is an original which was given to me by Mr. Tyler of the Dewey Portland Cement Company; and the Exhibit marked, for identification, 2387, is a tabulation of basing points and gross basing point prices prepared for me in the office of the Dewey Portland Cement Company. The basing prices begin with June, 1933, and continue up until February 20, 1936.

13381 Q. When did you get these papers that you are referring to now, and from whom did you get them?

A. I—at our conference there was present a Mr. F. E. Tyler, his son, W. E. Tyler, a Mr. Moore, who was an officer and attorney for the company, and Walter H. Gray, the sales manager.

In the course of that conference I told them what I wanted with regard to a compilation of basing points, and then this list, which is set forth in Exhibit marked, for identification, 2387, was prepared under the direction of Mr. Gray, and I finally secured it from him a week after I had the original interview.

Q. And when was that?

A. The original interview was held on November 16, 1936.

Q. Is that shown by any notations on these papers?

A. Yes, it is shown by—it is shown in my own handwriting, and the exhibit—both exhibits bear my name.

Q. When did you put your handwriting on there?

A. Well, shortly thereafter.

Mr. Leisure: Were both exhibits obtained at the same time, Mr. Wooden?

13382 The Witness: Yes.

Mr. Leisure: I am not clear on that.

The Witness: Both were obtained at the same time.

Mr. Wooden: They might have been a week apart.

The Witness: Yes, or a week apart. The first one I secured on the 16th, and I had to go back, and a week later I got the other one.

By Mr. Wooden:

Q. Did you have any conversation with Mr. Tyler, F. E. Tyler, concerning his company's use of the basing point method of making prices?

A. Yes.

Q. Will you state what you said and what he said about that?

Mr. Leisure: Again may we have which Mr. Tyler and when it was?

The Witness: I may state for the record—

Mr. Wooden: I said "F. E."

The Witness: —that Mr. F. E. Tyler, the president, did practically all of the talking during this conference, which was about two hours.

Mr. Leisure: May we have the date, Mr. Wooden?

By Mr. Wooden:

Q. Can you fix the date?

A. On November the 16th.

The Dewey Cement Company has a plant at
13383 Dewey, Oklahoma, and one at Davenport, Iowa.
The plant at Dewey, Oklahoma, is not, according to Mr. Tyler, a basing point. So when they arrive at the delivered prices at specified destinations going into Oklahoma, they use a basing point either the plant of Universal-Atlas at Independence, Kansas, or the plant of the Lehigh at Iola.. They are both the same as they are located in the gas belt.

Q. Did you have any talk with Mr. F. E. Tyler as to whether or not his company was a leader in the making of prices?

A. No, his company was not.

Q. What is the answer to my question?

A. In the course of this conversation, he stated that all of the Lehigh and Universal plants are basing points, and that they are the recognized leaders in the industry, and that the Dewey Company, being a smaller company, could do no better than simply follow the prices of these two concerns at their basing points which are applicable.

Q. Did you have any talk with Mr. F. E. Tyler as to how he calculated—how his company calculated its delivered price in a particular—at a particular destination?

Mr. Leisure: Now, if your honor please, I want to object to the method of examination. At least, this is one witness that it cannot be said that he is connected with the
respondents by corporate relationship or otherwise,
13384 and I object to the leading character of the examination he is now proceeding under. I think I am entirely correct in saying that the proper method is, after

having ascertained that the witness had a conversation with Mr. Tyler on November 16th, to ask him what that conversation was. This leading character of questioning I think is improper.

13385 Q. State whether or not Mr. F. E. Tyler gave you any illustration of how he figured his destination price in a particular destination.

A. Yes.

Q. Now state what he told you in that connection.

A. Well, he took as an illustration the point at Enid, Oklahoma, and the delivered price at this point on the part of Dewey as of November the 16th, 1936, was $2.71 per barrel. And that price was determined as follows: It took the base price of $2.10 gross at Independence, Kansas, added to that price a freight rate of 57 cents

13386 from Independence to Enid, plus a 4 cents surcharge, making a total delivered price of $2.71.

The base price is quoted by Dewey as gross, which includes the tax and the 10 per cent—the 10 cents a barrel discount, making it $1.60 net.

By Mr. Wooden:

Q. Did he explain any method of using the freight, how he calculated the freight?

Mr. Leisure: Now, I make the same objection. I think the conversation should be brought out.

Trial Examiner Norwood: I don't think that that suggests any answer. Objection overruled.

A. Well, they took the lowest freight rate from the base price which would be applicable.

By Mr. Wooden:

Q. Did he use any freight compilation in your presence for that calculation?

Mr. Leisure: So that I won't have to continually interrupt, your honor, will you allow me an objection to this type of examination?

Trial Examiner Norwood: Yes.

Mr. Leisure: As to all of it that is continued in this fashion.

13387 A. I don't exactly recall. I think that Mr. Gray brought in a rate book, but I can't exactly recall it.

Q. Did you have any talk with Mr. F. E. Tyler as to his company's policy with regard to—state whether or

not you had any talk with Mr. F. E. Tyler with regard to his company's policy as to making lower prices in the vicinity of its mill.

A. The only instance that I recall was the case of the delivered price on cement at Bartlesville, Oklahoma, a town about six miles from the Dewey plant at Dewey, Oklahoma.

Q. State whether or not you had any conversa-
13388 tion with Mr. F. E. Tyler regarding bids on a Government project at Beverly, Texas.

A. I did.

Q. Will you state what he said and what you said about that?

A. Well, that was a project calling for approximately 300,000 barrels of cement, and the bids submitted by all of the cement companies were identical to the fourth or fifth decimal point. And I asked Mr. Tyler in the course of this interview that if a mill in the vicinity of that—if a mill in the vicinity of Beverly, Texas, needed extra tonnage to cut down overhead, why wouldn't they submit a lower bid, and Tyler stated that if—

13389 A. —that if a mill had submitted a lower bid, it would disrupt the price structure.

Q. You mentioned this Bartlesville matter a few minutes ago.

A. Yes, sir.

Q. That you had a talk with Mr. F. E. Tyler about Bartlesville?

A. Yes, sir.

Q. Will you state what your conversation was on that subject?

13390 A. The delivered price on the part of the Dewey Portland Cement Company at Bartlesville, six miles from the Dewey plant, was higher than a combination of the basing point price plus freight to Bartlesville, and this was due to the fact that as Mr. Tyler explained, that they were taking advantage of their location in this instance.

Q. State whether or not you had any conversation with Mr. F. E. Tyler concerning the application of an extra freight surcharge?

A. Yes.

Q. Will you state what you and he said about that?

13391 A. Why, Mr. Tyler stated that his company put into effect the 4 cents per barrel surcharge on intrastate business in Oklahoma because the mills shipping from Kansas into Oklahoma were required by the Interstate Commerce Commission to add a surcharge on all interstate business.

13392 Q. Will you state, Mr. Bass, what the surcharge was you were referring to that Mr. Tyler said he added at his mill?

A. Referring to the surcharge, that was first ordered by the Interstate Commerce Commission in April of 1936.

By Mr. Wooden:

13393 Q. State whether or not you had any conversation with Mr. F. E. Tyler about the policy of his company with regard to trucking of cement.

A. Yes.

Q. Will you state what you and he said about that?

A. Up until about two or three years prior to the date of interview, the Dewey Portland Cement Company permitted trucking, that is, truckers would come to the plant and buy cement at the mill price, but that this was—this practice was discontinued two or three years prior to the date of interview, for the reason that truckers who came to the mill and purchased the cement and took it back to their respective destinations would be able to own it cheaper than some of their competitors who purchased in carload lots.

Q. Will you state whether or not you asked Mr. Tyler for the privilege of examining his correspondence files?

A. I did.

Q. What did he say?

A. Why, he refused. I first asked him the privilege of examining all correspondence passing between the Dewey Company and the Institute, and likewise, all correspondence passing between the Dewey Company and its competitors.

In reply to the latter question, Mr. Tyler stated that they do not segregate the correspondence according to competitors, and the correspondence with the com-

13394 petitors could only be secured by going through the entire mass of correspondence, and he was afraid if this were permitted, certain documents might be secured which could be easily misconstrued or misinterpreted if taken away from the plant.

However, I might state that I returned a week later, and Mr. F. E. Tyler was absent, but his son permitted an examination of all the correspondence passing between the Dewey Company and the Cement Institute.

Q. Now, in the course of your work on the cement inquiry, did you call upon Mr. Sunderland of the Ash Grove Lime and Portland Cement Company?

A. I did.

Q. What was his position with the company?

A. He was president.

Q. And where did you call upon him?

A. In Kansas City, in his office at Kansas City.

Q. Will you state whether or not you discussed with Mr. Sunderland the policy of his company with reference to pricing according to the basing point system?

13395 A. Yes.

By Mr. Wooden:

Q. Will you state what you and he said about that?

Mr. Leisure: Now, I object to that; first, that there is no time fixed at all as to when this may have taken place.

Mr. Wooden: Fix the time.

Trial Examiner Norwood: He will fix the time and place.

Mr. Wooden: Fix the time and place in your answer.

Trial Examiner Norwood: Answer the question.

A. About November the 24th, 1936.

13396 Trial Examiner Norwood: The objection is overruled.

A. Mr. Sunderland stated that he has a mill at Chanute, Kansas, which is not a basing point, but on all cement going into Kansas and Oklahoma his selling price was based on Universal-Atlas at Independence, Kansas, and was shipped into southern Oklahoma based upon Harry's or Fort Worth, Texas.

By Mr. Wooden:

Q. Did you ascertain from Mr. Sunderland where his mills were located?

A. Yes, sir.

Q. Where were they?

A. At Chanute, Kansas, and Louisville, Nebraska.

Q. State whether or not you had any conversation with Mr. Sunderland as to the existence of a basing point at Louisville, Nebraska?

13398 By Trial Examiner Norwood:

Q. Did you discuss basing points in Nebraska with him?

A. Yes, sir, the one at Louisville, Nebraska.

Q. Yes. Tell us what he said and tell us what you said.

A. Mr. Sunderland stated that this plant at Louisville, Nebraska, was built by him in 1929, and he never intended it to be a basing point, but that in 1932 one of the largest cement companies, which operates a number of plants in the United States, whose name he would not disclose, made this plant of his at Louisville a basing point and depressed what had been the price theretofore, and not only did this large cement company make this a basing point, but that the cement company was acting in concert with two or three other competitors and by agreement made Louisville, Nebraska, a basing point, which Sunderland told me he considered a violation of the anti-trust laws, and since then, 1932, Louisville, Nebraska, has been a basing point.

13399 By Mr. Wooden:

Q. State whether or not you had any conversation with Mr. Sunderland as to bidding on government projects where land grant rates were involved?

A. Yes.

Q. Will you state what you and he had to say about that?

13400 A. He stated that it was necessary in these government bids which involved land grant rates to frequently carry out the price to a number of decimal points, for in the event that one cement company dropped a decimal point or so, it would disrupt the price structure.

By Mr. Wooden:

Q. In the course of your work on the same inquiry, did you make any call on officers of the Monarch Cement Company?

A. Yes, sir.

Q. Whom did you see?

A. I first interviewed a Mr. F. H. Rhodes, who is president, and then I called several days later and interviewed Mr. C. A. Brookes, who is vice president and general sales manager. The date of the interview with Mr. Rhodes was about November the 17th and the one with Mr. Brookes about the 22nd of November, 1936.

Q. Did you discuss with any of those gentlemen their policy with regard to whether or not they used the basing point system?

A. Yes.

Q. Will you state what was said and who said it?

13402 A. If your honor please, first, in regard to what Mr. Rhodes said at the time of my interview with him on November the 17th, he stated that the Monarch Cement—the Monarch Portland Cement Company at Humbolt, Kansas, was not a basing point, but that they used as their basing points Independence, Kansas, Iola, Kansas, Kansas City, Fort Worth, Texas, and Marquette, Missouri, and in arriving at their delivered prices they added the known freight rate from a given base to destination.

Rhodes also stated during this interview with him on the 17th that the prices in the cement industry were identical and have always been identical.

By Mr. Wooden:

Q. Did he say anything more about that?

Mr. Leisure: We make the same objection.

Trial Examiner Norwood: Yes, the same ruling.

A. About the prices being identical?

By Mr. Wooden:

Q. Yes.

A. I think an additional fact he stated was the fact that the prices were identical as the result of competition, of meeting prices at certain destinations.

Q. State whether or not you discussed with either of those gentlemen the subject of Government bids involving land grant rates.

13403 Mr. Leisure: We make the same objection to that question.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: Objection overruled.

A. That I can't recall.

By Mr. Wooden:

Q. State whether or not in your conversation with either of those gentlemen you had any discussion as to how they calculated their freight rates in the pricing of their product.

Mr. Leisure: The same objection.

Trial Examiner Norwood: The same ruling.

A. Yes.

By Mr. Wooden:

Q. And what was said and by whom?

A. Well, they secured their freight rates from a mill to a given destination by consulting the freight service put out by The Cement Institute.

Mr. Wooden: Will you give these the next numbers, please?

(The documents referred to were marked "Commission's Exhibits 2388 and 2389", for identification.)

By Mr. Wooden:

Q. Showing you a paper marked 2388, for identi-
13404 fication, will you state where and when you first saw that paper?

(Handing document to witness.)

A. This exhibit marked for identification, 2388, is a quotation blank used by the Monarch Cement Company and this was furnished me by Mr. Brookes.

Q. And what is the paper marked 2389? Where and when did you first see that?

(Handing document to witness.)

A. The first time I saw this exhibit marked, for identification, as 2389, was when it was given me by Mr. Brookes of the Monarch Cement Company.

Q. In the course of your cement inquiry, did you call upon the Oklahoma Portland Cement Company?

A. I did.

Q. Whom did you see there?

A. I saw Mr. P. A. Thompson, manager, and the attorney, J. Barry King.

Q. State whether or not you discussed with Mr. Thompson the matter of his company's use of the basing point system in making prices.

13405 A. The time was about October the 12th, I think, 1936, and the place where this interview was held, I don't recall whether it was in Mr. Thompson's office or in the office of his attorney, Mr. J. Barry King, but I am inclined to believe in Mr. King's office.

By Mr. Wooden:

Q. And what was the conversation about the basing point system?

A. The Oklahoma Portland Cement Company has a plant at Ada, Oklahoma, which up until about 1932 was a basing point, but since then has not been a basing point, and the Oklahoma Portland, in making its prices at various destinations, uses the basing point—uses the plant of the Universal-Atlas at Independence, Kansas, and the mill located at Harry's or Fort Worth, Texas.

Q. State whether or not you had any conversation with Mr. Thompson regarding the trucking of cement.

13406 A. Yes.

Q. What was said about that?

A. Up until about two or three years prior to the date of the interview, the Oklahoma Portland permitted trucking, but that was discontinued and the reason, as given by Mr. Thompson, was that if a dealer was not large enough to purchase in carload lots, why, he wouldn't consider him a legitimate dealer.

13407 Chicago, Illinois,
January 12, 1939.

13409 JOHN H. BASS resumed the stand and testified further as follows:

13410 Q. In the course of the conversation which you specified, state whether or not you discussed with Mr. Thompson the subject of uniformity in delivered prices to government agencies and to any other class of purchasers?

A. I did.

By Mr. Wooden:

Q. Will you state what you and he said—what you and they said about it?

A. Well, Mr. Thompson stated that as a general rule the quoted delivered prices of cement to the dealers, State and Federal governments were generally uniform, and the reason for it it was a question of meeting competition.

Q. Will you state whether or not you had any conversation with Mr. Thompson about bids on a project in New Mexico known as the Tucumcari Project?

13411 A. Yes.

Q. Will you state what that conversation was?

A. Well, at the time of this interview with Mr. Thomp-

son and Mr. King, Mr. Thompson stated that he had just returned from Tucumcari, New Mexico, where there had been a number of bids submitted on a federal project, but in this instance there was a discrepancy or a difference in prices on the part of some of the cement companies, and as a result competition was very keen.

Q. Will you state whether or not you examined any of the files of the Oklahoma Portland Cement Company?

A. I did not.

Q. Did you ask for that privilege?

A. I did.

13412 Q. Mr. Bass, did you specify any type or character of files that you wished to examine?

A. By that do you mean between certain parties, certain institutions?

By Mr. Wooden:

Q. Answer it in any way you like.

13413 A. Yes.

Q. What did you specify?

A. I asked permission to examine, first, all correspondence passing between the Oklahoma Portland and the Cement Institute, and, secondly, all correspondence passing between the Oklahoma Portland and their competitors in the territory in which they operated.

Mr. Leisure: Now, I want to object, your honor.

Had you finished? I didn't mean to interrupt you.

The Witness: Yes.

Mr. Leisure: I want to object to this entire line of cross-examination on the ground the questions are incompetent, irrelevant and immaterial, and they do not prove or tend to prove any of the issues in this case.

Trial Examiner Norwood: Objection overruled.

By Mr. Wooden:

Q. What did Mr. Thompson or Mr. King or both of them say in response to your request that you have just testified to?

A. With regard to an examination of the correspondence between the Oklahoma Portland and The Cement Institute, they stated they had some correspondence, but they would rather that correspondence be secured from The Institute itself, and with regard to an examination of correspondence passing between the Oklahoma Portland and

its competitors, Mr. Thompson stated they had some
13414 correspondence, but stated it did not relate in any way to basing points.

And then I again returned to Mr. King and made the same request, individually, and he stated that if I could specify certain documents which I wanted, he would be very glad to show them to me.

Cross-Examination by Mr. Leisure.

Q. Mr. Bass, you are an attorney at law?

A. Yes, sir.

13415 Q. Just give me your best recollection of when you first stated to investigate any one in connection with the cement industry?

A. You mean any one cement company?

Q. Any one manufacturing company of cement.

A. Well, I presume, to the best of my recollection, it was during the Code days, about 1934, but I will say this, that frequently we have had cases which involved a complaint where some dealer could not buy cement from one of the cement companies or from several cement companies, and we had those types of cases.

Q. Was that prior to 1934?

A. To 1934, even prior to 1934.

Q. Well, when would be your first investigation as to any of those cases?

A. About 1928, '27 or '28.

Q. Do you recall the parties you interviewed in
13416 those interviews in 1928? I mean, do you remember what company it was connected with, that the investigation was made?

A. No, I can't recall now.

Q. Well, now, you started to tell me about this case. When did you first start investigation with respect to this case?

A. In the fall of 1936.

Q. And you gave us yesterday four companies that you interviewed. Were there any others that you interviewed with respect to this case?

A. Yes.

Q. Who were they? What companies?

A. That was the Consolidated Portland at Fredonia, Kansas. I talked to a Mr. L. W. Rogers.

Q. Was that also in 1936?
A. The fall of 1936.
Q. What other company?
A. You mean in connection with this case?
Q. Yes.
A. I think that is all.

13417 Q. As a matter of fact, what you do when the interview is over and you have a convenient opportunity, you sit down and attempt to write up what happened, is that a fair statement?
A. Yes, make a report.

13418 Q. Yes. Having made your notes, then do you transcribe them into some typewritten form in the form of a report?
A. Yes, sir.
Q. Now, in these cases that you are called upon to give testimony, then you are able to refer to these typewritten reports before you testify and have the details in mind in that way, is that correct?
A. Yes, we oftentimes consult the reports.
Q. And, as a matter of fact, that same practice was followed with respect to your testimony yesterday, was it not?
A. You mean, did I read the reports of these interviews?
Q. Before you testified you read the reports?
A. Oh, yes.

13420 Q. Now, when you testified yesterday with respect to these four companies, you interviewed, did your testimony cover the entire interview or only those portions of the interviews which were called to your attention by counsel for the Commission?
A. Well, it didn't cover all of the facts in the reports.
Q. That is, some selection was made in the form of the questions that were asked?
A. Yes.
Q. And you answered those questions to the best of your ability?
A. Yes, sir.
Q. Who made that selection out of the interviews as to what questions would be asked?
A. Why, I don't know. I didn't.
Q. You did not make them?
A. No.

Mr. Wooden: I did, Mr. Leisure.

13421 The Witness: Either Mr. Wooden or one of them over there.

By Mr. Leisure:

Q. The selections that were made, were they selected on the same ground that you mentioned a moment ago, about when you made the report, that they were the ones which seemed to be pertinent and relevant to this case?

A. Well, I presume that is what Mr. Wooden had in mind when he made the selection.

Q. Yes. Both as to when you did it and when it was done, as you suggest, by Mr. Wooden, you mean pertinent and important to the Commission or important to the men interviewed?

A. First, when I write an interview report, I try to give an accurate picture of what the man told me that night be pertinent one way or another, either in favor of the man interviewed or for the Commission. In other words, I try to give an accurate portrayal of the facts.

By Mr. Leisure:

Q. Now, you said some selection was made, however?

13422 A. Yes.

Q. You didn't put down everything?

A. What?

Q. You didn't put down everything? You made some selection?

A. In my report?

Q. Yes.

A. Oh, yes.

Q. Yes. You intended to put down those things which you thought were pertinent and important?

A. Yes.

Q. Now, what I wanted to find out is whether you intended to put down what you thought was important to the Commission or important to the man you were examining.

A. Oh, I put down those facts that are important—in other words, I will state it this way: I put down all of the facts which a man states, whether those facts might be favorable to the Commission or from his own indivdual standpoint.

Q. In other words, was that practice followed with

respect to the selections that were made for your testimony out of those interviews?

A. That I don't know. I don't know, because I didn't select those particular facts.

Q. I think you said you saw Mr. Sunderland in
13423 one of these interviews. When did you see Mr. Sunderland?

A. I saw Mr. Sunderland? When?

Q. Yes.

A. I saw him on November the 24th, I think, 1936, in his office in Kansas City. That date may be off a day or so, but I could easily determine it if I knew when the election was held in 1936.

Q. What did you say to Mr. Sunderland about whether or not he was a price leader?

A. A what?

Q. About whether or not he was a price leader.

A. A price leader?

Trial Examiner Norwood: Yes.

A. I don't get your question, Mr. Leisure.

By Mr. Leisure:

Q. I say, what—

Trial Examiner Norwood: Read it. Wait a minute.

(Question read)

A. I don't think we discussed that matter. I don't exactly know what you have in mind, but whether or not he took the initiative in determining of a certain price, I don't think—

By Mr. Leisure:

Q. I just wanted to know what you said, whether you asked him about that.

A. I don't remember asking him that specific question.

13424 Q. What did you ask Mr. Tyler about that, whether or not his company was a price leader?

A. Well, this conference in Mr. Tyler's office, as I said yesterday, was between—was attended by four representatives of the company, and myself, and Mr. Tyler did—the elder Mr. Tyler, Mr. F. E. Tyler, did all of the talking, and what I testified to yesterday was what he practically said in the course of his narrative.

Q. The difficulty is, Mr. Bass, you told us yesterday

only what you remember that Mr. Tyler said. I am now interested in knowing something of what you said.

A. What I said?

13425 Q. What did you say to Mr. Tyler about his being a price leader or his company being a price leader?

A. Oh, as I recall it, I went into the office of the four gentlemen, that is, I saw Mr. Tyler and he called in the other three, and I told him that this investigation was being made of the cement industry.

Q. Mr. Bass, I think I can save some time. I don't want to review your entire testimony of yesterday. I am just now trying to call your attention to one item, and I am trying to find out what your recollection is on that.

A. Just state the question again. From your question I don't just exactly know what you want.

Q. I want to know what you said to Mr. Tyler about whether or not his company was a price leader?

A. Oh, I think as a matter of fact, Mr. Tyler stated that himself. You see, these discussions—

Q. You don't think you asked him any question about that at all?

A. These discussions are more or less informal and off the record, and in the course of explaining his company's price policy, which all of them do, why, he simply stated, as I said yesterday, that they generally base their price on Universal-Atlas at Independence, Kansas.

Q. Have you finished?

A. Yes.

13426 Q. What did you say to him as to whether or not his company was a price leader?

A. I don't think I said anything.

Q. Now, did you ask him whether or not the cement industry had been selling at identical delivered prices for over 30 years?

A. I don't remember the 30 years.

Q. Did you attempt to confine your inquiry as to any limited period of years when you were asking him these questions?

A. No.

Q. That is, you didn't confine it to any certain period of years?

A. No.

Q. Then will you tell me whether or not you did ask him the question that I just asked you. Do you recall it?

A. Whether or not prices were uniform?

Q. Whether or not the cement industry had been selling cement at identical prices for over 30 years?

A. No, I didn't ask him that question with regard to the 30 years.

Q. You didn't ask him that?

A. No, not about 30 years.

Q. Well, did you ask him that question at all?

A. We did discuss the uniformity of prices and why they were uniform.

13427 Q. Didn't you think it was important to ask how long they had been doing it?

A. Well, I presume, as a matter of fact, that is generally known. I don't think—

Q. And being known, you thought it was not important to ask about it?

A. Well, perhaps so.

Q. Now, did you ask Mr. Tyler whether or not in his business experience he had found that his customers all preferred to buy their cement at delivered prices?

A. No, I didn't ask him that question.

Q. Didn't you think that that was important?

A. I didn't know whether it was important or not. I don't recall asking him that question.

Q. As a business man you think it is important to know what all the customers wanted, don't you, Mr. Bass?

A. Well, I don't know whether I am qualified to answer that or not. I might state though that Mr. Tyler and all the rest of them told me that they preferred to have their prices quoted on a delivered basis, I mean a delivered price.

By Trial Examiner Norwood:

Q. That the customers preferred it?

A. Yes.

Trial Examiner Norwood: Yes.

13428 By Mr. Leisure:

Q. Mr. Bass, did you tell us yesterday everything that you remember about your interview with Mr. Tyler?

A. No.

Q. There was considerable more? That is, you gave us four short statements that Mr. Tyler said to you. There was considerable more to that conversation, wasn't there?

A. Well, Mr. Leisure, those four statements are a summary of what we discussed for the several hours.

Q. Yes. And there was considerable more said then, isn't that so?

A. Oh, yes.

Q. That is, you talked for two hours, as you told us yesterday?

A. We were up there about two hours. They told me how good their cement was, and all that.

Q. Now, you told us this morning, Mr. Bass, that the Oklahoma Portland Cement Company refused to turn over the files that you demanded. Did you take any steps to secure these files?

A. I did not. You mean me personally?

Q. Yes.

A. No, I did not.

Q. And when you were talking with Mr. Thompson about it, did you tell Mr. Thompson that—the Okla-
13429 homa Portland Cement Company is the one we are discussing, isn't it?

A. Yes.

Q. (Continuing)—that you have to report to the Federal Trade Commission that he had refused to give you access to the files?

A. Did I tell him that?

Q. Yes.

A. Oh, I don't recall whether I did or not.

13431 Q. You don't recall. Now, will you tell us whether you did tell him at the time that he was entirely within his rights?

A. No, I did not.

Q. (Continuing) If he did not give you the files?

A. I did not tell him that.

Q. With respect to the other individuals that you have told us about, the four companies, did you tell any of them with respect to their rights as to turning over files to you?

A. I did not.

13432 Mr. Leisure: Your Honor, it now appears that there are certain records or reports from which this witness has—or, which this witness has used as an aid to his memory in his testimony, and the testimony that he has given is not complete. I, therefore, want to call for those reports at this time, in order that I may continue my cross-examination.

Will you produce them, Mr. Witness?

The Witness: I haven't them.

Mr. Wooden: I shall assume the responsibility of advising the witness that he is not authorized to produce them, and I assume the responsibility also for declining to produce them myself. The witness has not referred to any of those reports on the witness stand. He hasn't referred to any papers whatever on the witness stand.

Furthermore, the original reports are a part of the confidential files of the Commission.

13434 Mr. Hershberger: At this time I would like to make a motion to strike from the record all of the testimony of this witness on the ground that counsel for respondents have been denied the opportunity of proper cross-examination of the witness.

Trial Examiner Norwood: Motion denied.

Mr. Leisure: I am not sure, your honor, whether 13435 we have a ruling on the record. I am asking the Examiner to instruct Mr. Wooden to give us those papers so that we may complete our cross-examination.

Trial Examiner Norwood: The Examiner will deny that motion for the simple reason that he knows or believes that Mr. Wooden has no authority to turn them over. The counsel for respondents may apply to the Commission for them, if he wishes.

Proceed.

By Mr. Leisure:

Q. Mr. Bass, you have testified that the Dewey Company added a surcharge to the freight although it did not apply to interstate shipments; is that correct?

A. I think—yes.

Q. Didn't Mr. Tyler tell you his Dewey mill met prices of its competitors?

A. Yes.

Q. Didn't he tell you that his competitors outside the state were subject to the interstate surcharge?

A. Yes.

Q. Didn't he further state that because of this fact the competitive price which Dewey met included the freight surcharge?

A. Well, he said in that regard, that he was meeting the price of his competitors, which on interstate com- 13436 merce was raised 4 cents.

Q. Didn't he say that as a result Dewey's price included the surcharge?

A. Yes.

Q. Didn't he tell you that he had been selling cement in the same manner for more than twenty years?

A. Oh, yes, during the course of that conversation, as long as he had been in business.

13441 By Mr. Zimmerman:

13453 Q. Now, you say you had a conversation with Mr. Tyler. What was the place of that conversation?

A. That was in the office of the Dewey Portland Cement in the Fidelity Building at the corner of 11th and Baltimore in Kansas City.

13455 Q. Tell us what he said.

13456 A. All right. He explained somewhat in detail as to how the Dewey Portland—

Q. Excuse me, Mr. Bass. As nearly as you can, tell us what was said without characterizing it at all.

A. All right. He said the manner in which Dewey determines its delivered prices, and in the course of that conversation he stated that the Dewey Portland Cement Company has a number of salesmen in its operating territory, chiefly Kansas and Oklahoma, and that whenever these salesmen run across a new price quoted by some competitor, they furnish that to the Kansas City office; when they get several of such new quotations on the part of some cement company, they know that that company has either changed their base price or has become a basing point, and they, knowing the freight rate from a given base to a destination, they can easily determine the new price, and then having determined the new price, why, they can by using the known freight rates ascertain the competitor's price to all other destinations.

Q. You mean they could get the price, the delivered price less the freight, so that they could determine what that competitor was using as a base?

A. Yes.

13458 Q. I don't mean to or to interrupt you. Now, is that the extent of what you—of what he told you about prices and how they found out about them, and what they did? I am afraid we did interrupt you a little bit. Would you like to have the stenographer read what you said?

A. No. I have a recollection of what I said.

Q. All right, go right ahead.

A. Well, he further stated that when a competitor

makes a lower price, that Dewey has no alternative except to meet it, because cement is cement, and he couldn't get one cent more per barrel for his cement, and then if the price went up, he wanted to get as much money as possible and he raised his price also.

Redirect Examination by Mr. Wooden.

Q. Mr. Bass, before you referred to any of your interview reports this week, did you have any independent recollection of any of the matters that you have testified to?

A. Oh, yes.

Q. Can you state which?

A. I had an independent recollection as to what
13467 Mr. Sunderland told me with regard to making his plant at Louisville, Nebraska, a basing point, and I recall Mr. Sunderland's statement that to quote a lower price on the part of a competitor would disrupt the market. I recall that—I recall that Mr. Sunderland, president of Ash Grove Lime and Cement Company, said they have a plant at Chanute, Kansas, which is not a basing point, but that they use Universal-Atlas' plant at Independence, Kansas, as a basing point, and the plant at Harry's, Texas, when shipping into southern Oklahoma.

Trial Examiner Norwood: After reviewing those reports, did you have an independent recollection of all you have testified to here?

The Witness: Not all of the details.

Trial Examiner Norwood: That is, after your memory was refreshed by reading those reports, did you have an independent recollection of everything you have testified to?

The Witness: Yes, after reading those reports, I had.

By Mr. Wooden:

Q. But, as I understand your answer to my previous question, you had the recollection prior to and independent of your reading your reports; is that correct?

A. Yes, sir.

13468 Trial Examiner Norwood: That is what he said.

Mr. Leisure: Well, he had a recollection of what Mr. Wooden—

Mr. Wooden: Just what he specified.

Trial Examiner Norwood: He has stated.
Mr. Wooden: Of what he has specified.
Mr. Leisure: Of what he has said, yes.

By Mr. Wooden:

Q. Is there anything else that you had an independent recollection of that you have testified about prior to and independent of your reference to your interview reports?

A. Yes.

Q. Give me all that.

A. With regard to the interview that I had with Mr. Tyler and Mr. Gray and Mr. Moore and Mr. Tyler, Jr., of the office of the Dewey Portland Cement Company, I remember that we—I remember what I testified to this morning as to how the Dewey Company fixed its delivered prices, and I remember that we took Enid, Oklahoma, as an illustration of how those prices were determined at Enid.

Q. When you say you remember, do you mean that you remembered it prior to and independent of your—

A. Yes.

Q. —interview reports?

A. Yes.

13469 Q. Anything else in the same category?

A. Well, I remember the statement on the part of Mr. Rhodes of the Monarch Portland Cement Company at Humbolt, Kansas.

Trial Examiner Norwood: You needn't go into
13470 detail, if you specify it sufficiently for us to identify it with the testimony you have already given.

A. Well, I remember Mr. Rhodes' statement that prices have always been uniform, always will be, but it was a result of meeting competition. I remember independently the same statement made by Mr. Thompson of the Oklahoma Portland, and I very vividly recall Mr. Thompson's statement that at the date of the interview, he told me he had just returned from Tucumcari where there was bids on a number of barrels of cement for a Government project, and that there was some variations in the prices.

By Mr. Wooden:

Q. Do you mean that you remembered those things independently and prior to your reference to your interview reports?

A. Yes.

13476 Mr. Leisure: I want to move to strike out that portion of the witness' testimony given yesterday where counsel for the Commission took certain portions of the interview and directed the witness' attention to those and asked him to answer those specific questions.

Trial Examiner Norwood: Yes.

Mr. Leisure: I want to move to strike his testimony with respect to those questions now.

Trial Examiner Norwood: Motion denied.

13480 HOWARD MILLER, resumed the stand as a witness for the Commission and testified further as follows:

Mr. MacIntyre: If your Honor please, yesterday afternoon when this witness was on the stand he produced, in response to a subpoena duces tecum, documents which were marked for identification as Commission's Exhibits 2367 to 2379, inclusive, one of which was admitted yesterday into evidence, that being document 2371-A and B. The other documents in that group were submitted to counsel for the respondents, to Mr. McPherson, for the purpose of checking them over overnight, with a view of seeing whether or not he could determine that he could arrive at any stipulation with counsel for the Commission concerning those documents.

We now ask Mr. McPherson whether he can make any statement concerning any stipulation that he feels at this time he can make concerning them.

Mr. McPherson: Mr. MacIntyre, Mr. Schofield, my associate, will make reply to your query.

Mr. MacIntyre: All right.

13481 Mr. Schofield: We have studied the documents which you have mentioned, and the Trinity Portland Cement Company, as a result of that study, waives further identification of the Commission's exhibits for identification, Nos. 2367, 2368, 2369, 2370, 2372, 2373, 2374, 2375, 2376, 2378 and 2379.

The Trinity Portland Cement Company cannot vouch for the authenticity of the Commission's exhibit, for identification, No. 2377-A to D, and will, therefore, require strict proof of that document.

Trial Examiner Norwood: All the others were named?

Mr. Schofield: 2371 was received yesterday. Here are all the documents which you gave Mr. McPherson yesterday.

(The documents referred to were handed to Mr. MacIntyre.)

Mr. MacIntyre: Your Honor please, we now offer in evidence the documents marked for identification as Commission's Exhibit 2367, 2368, 2369-A and B, 2370-A and B, 2372, 2373, 2374, 2375, 2376, 2378-A and B, and 2379-A and B.

Trial Examiner Norwood: All but 2377?

Mr. MacIntyre: That is right.

13489 (COM. EX. 2369-A and B was offered and received in evidence.)

13490 The witness recognizes Com. Ex. 971 23i and 23J as a letter, dated October 15, 1935, on the letterhead of the Consolidated Cement Corporation, and he recognizes his own signature, as the person who signed the letter, as secretary and treasurer of that corporation; the witness recognizes the handwriting, on Com. Ex. 971 19 B, which reads "Fredonia Plan" as his hand-

13491 writing. His recollection is that it has some reference to the Clark and Burns questionnaire, as a part of a questionnaire submitted by the witness's company to them.

Q. Do you have in your organization as an official of the Cowham Engineering Company and of the Signal Mountain Portland Cement Company, a traffic manager by the name of J. B. Johnson?

A. That is right.

Q. How long has he served in that capacity for those companies?

A. Well, now, you have asked me about three companies. Which company are you inquiring about?

Q. Well, we will say the signal Mountain Portland Cement Company first, as traffic manager, how long has he served in that capacity?

13492 A. Well, I would say from ten to twelve years.

Q. And he continues today in that capacity?

A. Not in that capacity, no. He does—he supervises their traffic work—

Q. How long has he been—

A. (Continuing) —but he is not employed by the Signal Mountain Portland Cement Company. Originally he was.

Q. How long has he been traffic manager for the Cowham Engineering Company?

A. Well, it is a pure guess, but I would say eight or nine years; maybe longer.

Q. Mr. Miller, I now show you a document marked as Commission's Exhibit 415-572. That last is a sub-number for 415, and I ask you to state whether or not you recognize the signature of J. B. Johnson as that of your Mr. Johnson, traffic manager of the Cowham Engineering Company?

A. I would recognize that as his signature.

The witness was shown Com. Ex. 883 1J, and asked to state whether or not he recognizes the signature appearing on that as that of Mr. J. B. Johnson. He said: "That
appears to be his signature"; the witness recog-
13493 nizes the signature appearing on Com. Ex. 883 1O as that of Mr. J. B. Johnson; the witness recognizes the signature appearing on Com. Ex. 883 1Z as that of Mr. J. B. Johnson; the witness recognizes the signature appearing on Com. Ex. 883 2B as that of Mr. J. B. Johnson.

Mr. MacIntyre: That is all, Mr. Miller.

Mr. Leisure: No questions.

13495 JAMES FRYER, called as a witness on behalf of the Commission; being first duly sworn, testified as follows:

13498 *Direct Examination by Mr. MacIntyre.*

My full name and address are James Fryer, 9634 South Winchester Avenue, Chicago. That is my residence. My business address is Room 1321 at 228 North La Salle Street, the Builders Building, Chicago. I am president of the Builders Commercial Agency and have held that position about 45 years. That agency has been affiliated at some time with an organization over which Mr. L. I.
MacQueen of Pittsburgh, Pa. exercised some di-
13499 rection. That organization is the Building Materials Merchants of the Chicago district, which was a member of the National Federation of Builders Supply Associations. I was secretary of the Chicago branch of that organization. Mr. MacQueen held an official position

of secretary and treasurer in the national or parent organization, the National Federation of Builders Supply Associations. He held that position to my knowledge throughout the year 1935 and I held the position that I have stated with the Chicago Merchants during that entire year.

13500 Q. The entire year?

A. Yes, sir.

Q. Did you, in connection with your duties in that position, have correspondence with Mr. L. I. MacQueen?

A. I did.

Q. Do you have any knowledge of any other person being associated with Mr. MacQueen in his position by the name of H. S. Chaffee?

A. Yes, I do.

Q. What position did Mr. Chaffee hold in that organization with which you are affiliated, that is, you and Mr. MacQueen are affiliated?

A. If I remember right he was a member of the board of directors.

Q. Was he a member of any special committee, to your knowledge?

A. I think he was.

Q. Was he a member of a cement committee of that organization?

A. Yes, I think he was.

Q. Do you know whether or not he was chairman of the cement committee?

13501 The witness identified Com. Ex. 2390 as a letter from Mr. MacQueen to Mr. Chaffee of the Globe Plaster Co. of Buffalo. He recognizes Mr. Mac-
13502 Queen's signature there; Com. Ex. 2391 as a letter from L. I. MacQueen, secretary to all secretaries of Federated Units of the National Federation of Builders Supply Associations. He recognizes Mr. MacQueen's facsimile signature there; Com. Ex. 2392 A, B, C,
13503 as a letter from L. I. MacQueen, addressed to all secretaries of Federated Units. The witness was one of those secretaries and he recognizes Mr. MacQueen's facsimile signature to that letter; Com. Ex. 2393
13504 as a personal letter addressed to the witness at his business address by Mr. L. I. MacQueen, secretary of the National Federation of Building Supply Associations; he recognizes Mr. MacQueen's signature on the

letter; Com. Ex. 2394 A and B as a letter that went out from his office to Mr. MacQueen and was signed by the witness as executive secretary. It is a file copy that he retained of a letter that he sent to Mr. MacQueen;
13505 he doesn't think it is the original; Com. Ex. 2395 as a letter sent to Mr. James Wigginton of Evanston, which was signed by the witness's deputy, but it was signed with his authority. He was one of the employees in the witness's office at 228 N. LaSalle Street and was a deputy Code Authority; Com. Ex. 2396 as a letter from the Wm. E. Dee Material Company addressed to the witness and signed by John H. Vail, vice president of the Wm. E. Dee Material Company of Chicago; Com.
13506 Ex. 2397 A as a letter from L. I. MacQueen addressed to all secretaries of federated Units, and others; Com. Ex. 2397 B and C, as a circular letter of two pages that the witness supposes accompanied the original, the first letter. It states "What is a dealer?" and he supposes it came along with the other letter. He
13507 doesn't remember. He recognizes L. I. MacQueen's signature appearing on Com. Ex. 2397 A; Com. Ex. 2398 A and B as a letter from L. I. MacQueen addressed to A. J. Druecker, president of the "Building" Material Merchants of the Chicago District. The witness is secretary to that organization and he recognizes Mr. MacQueen's signature to the letter; Com. Ex. 2399 A,
13508 to F, inclusive as purporting to be a record of the minutes of the meeting of the directors of the National Federation of Builders Supply Associations, held at the Hotel Kansas Citian, Kansas City, June 3 and 4, 1936. The witness believes that he has seen it before in his office. He received it from L. I. MacQueen, and that is MacQueen's signature at the end of the report;
13509 Com. Ex. 2400 A and B as a letter from L. I. MacQueen addressed to all Federation secretaries on the date of that letter, August 9, 1935, the witness was one of those secretaries. He recognizes L. I. MacQueen's signature to the letter. He supposes that the letter was in his office or in his files. He thinks it naturally was. He kept the file, and he supposes it was in his file; Com.
13510 Ex. 2401 as a personal letter dated August 28, 1935, addressed to the witness by L. I. MacQueen. That is MacQueen's signature; Com. Ex. 2402 as a letter addressed to all presidents and secretaries of the federated

units from L. I. MacQueen, secretary. He recognizes
13511 L. I. MacQueen's facsimile signature on that letter; Com. Ex. 2403 as a letter addressed to all secretaries from L. I. MacQueen, and he recognizes L. I. MacQueen's signature; Com. Ex. 2404 A and B as a letter from L. I. MacQueen "to the dealer addressed". The witness doesn't remember whether he has seen it before. He recognizes L. I. MacQueen's signature to it; Com. Ex. 2405 A, B and C as a three page circular letter addressed with the caption "to the member addressed" from L. I. MacQueen. He recognizes L. I. MacQueen's signature.

13513 Q. Well, Mr. Fryer, I will ask you to read the portion near the center of the first page and the
13514 portion near the center of the second page of that particular letter, and then determine whether or not such reading has refreshed your memory and recollection concerning your having read the letter before, and if so, give us such information as you can concerning your having seen the letter before?

A. I would prefer reading the entire letter, if I might.

Q. Well, do whatever is necessary to refresh your memory and recollection.

13515 A. It was four years old. It is a letter dated July 11, 1935, and—yes, I do recall it now.

Q. What is it?

A. This is the time when the procurement division at Washington were buying cement—

13517 Mr. MacIntyre: If Your Honor please, I would be glad to withdraw that question and put another question to the witness.

Trial Examiner Norwood: All right.

By Mr. MacIntyre:

Q. Will you please state, Mr. Fryer, whether or not you recall having received that letter at about the date that appears on the letter, and, if so, from whom?

A. Yes, I do.

Trial Examiner Norwood: Whom did you receive it from?

The Witness: From L. I. MacQueen.

Mr. Zimmerman: What is the number of that exhibit, please?

Mr. MacIntyre: 2405-A, B, C.

Mark this one, please.

(The paper writing referred to was marked "Commission's Exhibit 2406-A, B and C", for identification.)

13518 The witness identified Com. Ex. 2406 A, B and C as a letter from L. I. MacQueen, addressed to the federated association, and enclosing a list of major commodity committees representing the National Federation. These are the committees. The witness recalls having received the letter and enclosure, from Mr. MacQueen, and that is Mr. MacQueen's facsimile signature appearing on Com. Ex. 2406 A.

Cross Examination by Mr. Leisure.

Q. Mr. Fryer, in identifying these papers, was there some kind of action brought by the Federal Trade Commission against the dealers of your association?

A. Yes, sir.

Q. Now, I notice that Mr. MacIntyre in examining you up to Exhibit 2400-A and B showed you exhibits that were bound in bound volumes, No. 2191-1 being one of them.

Does that recall to your mind any number as to

13519 the case of the dealers heretofore?

A. No, it does not.

Mr. MacIntyre: Yes. I would like to make this statement for the record at this time, that the documents marked in this proceeding as Commission's Exhibits, for identification, 2390, was identified on September 17th, 1936, by this witness in another proceeding, being Docket No. 2191, as Commission's Exhibit 407-A, and the following identified by this witness on that date by the following numbers: Today, 2391, as 409-A previously, 2392-A, B, C, as 438-A, B, C; 2393 as 439 previously; 2394-A, B as

440 previously; 2395 as 442 previously; 2396 as 443

13520 previously; 2397-A, B, C, as 444-A, B, C previously; 2398-A, B as 445-A, B previously; 2399-A to F, as 447-A to F previously; 3400-A, B as 461-A, B previously. The others being exhibits from 2401 to 2406 as identified today that were not previously identified by this witness.

By Mr. Leisure:

Q. Those letters, then, have been, Mr. Fryer,

13521 from what has been said as to your identification,

used in another case totally separate from this case as exhibits?

A. Yes, sir.

Mr. Leisure: That is all.

Mr. Zimmerman: No cross.

(Witness excused.)

A. C. CRONKRITE, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am vice president of the Universal-Atlas Cement Company. I have general supervision of sales for territory comprised of the southern parts of Michigan, Wisconsin, Illinois, Indiana and Kentucky.

Trial Examiner Norwood: Off the record just a minute.

(A discussion ensued off the record.)

Trial Examiner Norwood: Go ahead.

By Mr. Wooden:

Q. Will you tell us, Mr. Cronkrite, how the delivered price of standard portland cement for Chicago delivery is figured?

A. Yes, sir. To the base at our Buffington plant, which is $1.70, we add an arbitrary freight rate, which is 29 cents, and then the package costs, which is 40 cents. In other words, the car delivered price in cloth, in Chicago, would be $2.39.

Mr. Leisure: The question didn't say so, but I assume counsel meant for the witness' own company? It was a broad general statement.

Mr. Wooden: Oh, yes.

The Witness: I assumed that.

Mr. Wooden: I certainly meant nothing else.

By Mr. Wooden:

Q. You mentioned the addition of 29 cents, arbitrary freight. What is the actual freight from Buffington to Chicago?

A. The actual freight varies. There is several different freight rates. It runs from 12 cents a barrel to 40 cents a barrel rate.

13523 Q. And is that for delivery in the Chicago district, and, if so, define what the district is to which it applies?

A. The arbitrary zone to which we apply it parallels pretty closely what we call the Chicago Switching District, although it extends in spots a little beyond that.

Q. And what are the general limits of that Chicago Switching District?

A. Of the Switching District, it is a jagged line, but it runs from about—it splits the City of Evanston; it runs over to Des Plaines down to LaGrane, and down to Blue Island; then over to the county line in the State of Illinois. It also extends into the State of Indiana.

13524 Q. What part of Indiana does it include?

A. What is known as East Chicago and a little bit of the city of Gary, just touches the city of Gary.

Q. What is the range of actual freight in that district from Buffington?

A. From 12 cents to 40 cents per barrel.

Q. And do I understand that in that entire district the delivered price was calculated by the use of the arbitrary freight factor of 29 cents?

A. That is correct. We used it in that district.

Q. What is the reason for using a freight factor in that district that is not the actual freight?

A. There are about 80 odd dealers in Chicago, and some of them have one yard, some have several yards. They are competing for the same business. If they didn't have the same prices, we would be discriminating against some of them. In our judgment, it is the best way to conduct our business.

Q. How would you be discriminating in charging or calculating the actual freight to each dealer?

A. The dealers might be, their yards might be on opposite corners, one might have a low freight and the other high freight, and the one with the low freight could hardly get any business.

Q. You mean the one with the low freight?

13525 A. I beg your pardon. The one with the high freight.

Q. You mean he would have difficulty in meeting the price competition of the other with the low freight?

A. No, the one with the high freight would have difficulty in meeting the low freight competition.

Q. Has it been your experience that other cement mills selling into Chicago make their prices delivered to the dealers, the same as yours?

A. Yes, I should say so, as a general rule.

Q. Has the delivered price in Chicago ever been based upon some points other than Buffington?

A. Not to my knowledge.

Q. How far back does your connection with the company go?

A. 1907.

Q. And how long have you been in your present position?

A. In my present position since August, 1937.

Q. And what were your preceding positions back of 1937?

A. Prior to that, back to 1928, I was an assistant general sales manager. Prior to 1928, back to 1915, I was a district sales manager. Prior to 1915, I was a
13526 salesman.

Q. Mr. Cronkrite, I am showing you Exhibit 42-A—

Mr. Zimmerman: 42?

By Mr. Wooden:

Q. (Continuing)—42-A to C, inclusive, and 42-D to S, inclusive, have you ever seen those papers before?

(Handing documents to witness.)

Mr. Leisure: That is that last one 43-D to S?

Mr. Wooden: 42, all of them.

A. Never have.

By Mr. Wooden:

Q. That includes all?

A. That includes these three.

Q. And the subsequent ones also?

A. And also that and that. (Indicating.) Shall I keep going?

Q. Yes, over to S, 42-S.

Mr. Hershberger: Is that all one document, Mr. Wooden?

Mr. Wooden: All one number and the letters run to S.

Mr. Hershberger: Different documents?

Mr. Wooden: A number of them are.

Mr. Hershberger: I see.

By Mr. Wooden:

Q. Do you know anything about the matters that
13527 are set forth in those papers?

Mr. Wooden: I will confine it to A, B and C, No. 42.

A. It seems to concern price changes. I don't know, in this kind of language. I probably knew the price changes at the time.

By Mr. Wooden:

Q. You don't recall anything about the matters that are set forth in A, B and C, 42-A, B and C?

A. No, I don't.

Q. Showing you Exhibit 1950, for identification, have you ever seen the paper of which that is a photo-
13528 graphic copy before?

(Handing document to witness.)

A. No, sir.

Q. Do you know anything about the bidding on the Colorado River project in Texas—

A. No, I don't.

Q. —in 1936?

A. It never came under my supervision.

Q. Showing you Exhibit 2268, for identification, will you state whose handwriting and handwritten figures appear on the face of that paper?

(Handing document to witness.)

A. No, sir, I don't recognize this writing.

13529 Q. Will you look at papers marked 2269 to 2395, for identification, and see if you can state whose handwriting or whose handwritten figuring appears on the face of any of those papers?

A. I recognize this one (indicating).

Q. What number?

A. 2274.

Q. Whose handwriting is it on 2274?

A. Well, that looks like mine.

Q. All of it, you mean?

A. No, just the initials "C. T. B."

Q. Do you know whose the rest of it is?

A. No, I wouldn't know that.

Q. All right, go ahead.

(Witness examines paper writings.)

Q. No others that you recognize?

A. No others, no, sir.

Q. Was it the practice in your office to calculate back to base prices on circular quotations of other companies picked up in the field?

A. Yes, sir.

Q. Would you say that the calculations that appear on the face of the papers I showed you represent such calculations made in the office of the Universal-Atlas Company?

A. It looks to me like the kind of practice we have
13530 in our office, yes, sir.

Examination on Voir Dire by Mr. Leisure.

Q. Counsel for the Commission asked you, Mr. Cronkrite, about certain handwriting and you picked out the handwriting as far as you knew it; is that correct?

A. Yes, sir.

Q. As to the other handwriting, do you know of your own knowledge as to whether or not the figuring was done in your office?

A. I wouldn't know it from the handwriting.

Q. You didn't intend to identify it in any way as
13531 coming from your office without knowing whether it did or not?

A. It is not familiar handwriting to me. It could easily be done by some clerk in our office. That I don't know.

By Mr. Wooden:

Q. Referring, Mr. Cronkrite, to a paper marked, for identification, as 2339, and 2340, do you recognize the handwriting at the end, the initialed handwriting?

A. That looks like Mr. Greenly's "G".

Q. Mr. Greenly's "G". And who is Mr. Greenly?

A. Mr. Greenly was assistant to Mr. Stone.

Q. At that time? In December, 1932?

13532 A. Yes, sir.

Q. I will ask you, Mr. Cronkrite, whether there was a time some years ago when the delivered prices in the Chicago district were based on LaSalle?

A. I don't recall any such time.

Q. Do you recall any time where Buffington was what might be called a nominal base for Chicago delivery?

A. No, I do not.

Q. Does the expression "nominal base" carry any meaning to you?

A. No.

Q. How long has the delivered price of $2.39 prevailed in Chicago?

A. Since about November, 1937.
Q. Prior to that time can you say what it had been?
A. It was $2.35 prior to that time.
Q. How long had that been in effect?
A. From March 18, 1935, to November, 1937.
Q. Had it been in as far back as 1930?
A. Yes, sir.
Q. Without change?
A. I wouldn't say without change. There may
13533 have been some changes from time to time.
Q. How long has the arbitrary of 29 cents freight been used in the Chicago district?
A. Since—
13534 Q. I mean, how long has your company used the 29 cent freight arbitrary for Chicago delivery?
A. Since November, 1937.
Q. And has it been lower than that before?
A. It had been 25 cents prior to that.
Q. Was that also an arbitrary figure?
A. That was an arbitrary figure.
Q. And at the time the arbitrary was 25 cents, what was the actual?
A. The actual ran a few cents downward from the present actuals, the present being, as I said, 12 cents to 40 cents. I think the lowest before was 11 cents. I don't recall what the high was.
Q. Was the 25 cent arbitrary in effect during 1932?
A. I think it was part of the time, but not all of the time.
Q. Referring to Exhibit 2268, for identification, do any of the quotations thereon refresh your recollection as to whether the 25 cent arbitrary was in effect for Chicago delivery in 1932?
13535 A. It seems in one here—
13536 Trial Examiner Norwood: Yes. He asked the question whether or not that refreshed your recollection. You say whether it does or it does not.
The Witness: No, it does not.
Mr. Wooden: All right. I have no more from Mr. Cronkrite.

Cross Examination by Mr. Leisure.

Q. Mr. Cronkrite, Mr. Wooden just asked you about whether it was necessary to have a flat rate.
Mr. Wooden: I didn't ask whether it was necessary.

By Mr. Leisure:

Q. (Continuing) Or, I think you said it was necessary.

Mr. Wooden: I didn't ask him whether it was necessary.

Trial Examiner Norwood: He asked him why he had it.

By Mr. Leisure:

Q. Do you recall the testimony about that?

A. I do.

Q. I am just directing your attention to it. I am not trying to quote you or to quote Mr. Wooden.

A. Yes, sir, I do.

13537 Q. You recall his asking you about the flat rate?

A. Yes, sir.

Q. And I think you said it was because the dealers' prices might be different if you did not have a flat rate.

A. Yes, sir.

Q. And you said you had approximately 90 dealers in this district. Do you attempt to keep your dealers—is it necessary to have your dealers to have outlets in Chicago, in an area like Chicago?

A. Vitally necessary.

Q. And, in your opinion, would you be able to keep them if one dealer could sell higher than another in that area, sell lower than any other?

A. I don't think we could.

Q. And is that what you meant when you explained to Mr. Wooden why it was necessary to have a flat rate in your area?

A. Yes, sir.

Mr. Leisure: That is all.

Mr. Hershberger: No further.

Redirect Examination by Mr. Wooden.

Q. What difference does it make, Mr. Cronkrite, in your ability to retain your trade, as to whether one dealer sells higher than the other?

13538 A. Well, from my experience, competition between dealers is very similar to competition between manufacturers. The lowest price is the one that the material is sold at, and it is hard to get a penny more, from the dealers' standpoint, any more for cement than his competitor does, and the same applies to sand and gravel, as I understand it.

Q. Well, isn't it easy to get less than the other fellow though, get business at less than the other fellow's price?

A. You are speaking—

Trial Examiner Norwood: He is asking if the dealer could get the business if he sold lower. Is that the case?

The Witness: I think he would get the business.

13539 Q. And you could sell some dealers in the Chicago area at lower delivered costs to them if you charged the actual freight instead of the arbitrary, is that right?

A. That is obvious, yes, sir.

Mr. Wooden: All right, that is all.

13540 *Recross Examination by Mr. Leisure.*

Q. But you would lose all the others, is that right? Mr. Cronkrite, you would lose all the other dealers?

A. I think very likely.

13541 EUGENE CARMICHAEL, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am an attorney-examiner for the Federal Trade Commission in the Chief Examiner's Division, investigational work. I have been connected with the Commission

13542 almost five years. In the course of my official duties I have had occasion to make investigation of the cement industry.

Q. Will you state in a general comprehensive way just what the scope and extent of your investigation was, the time of it?

Trial Examiner Norwood: Briefly.

A. I was assigned as part of the investigation to interview four of the cement companies located in Michigan. I spent possibly three or four or five days on that investigation in November of 1936.

By Mr. Wooden:

Q. What were the companies that you called on?

A. I called on Wabash Portland Cement Company, Peerless Cement Corporation, and Aetna Portland Cement

Company, all at Detroit, Michigan, and Wolverine Portland Cement Company of Coldwater, Michigan.

Q. In general, what did you do at each of those places?

A. I questioned officials or representatives of those companies in regard to their selling practices in selling cement, the instructions they gave their salesmen, their methods of arriving at prices, the location of their plants, the territory covered by sales, the number of salesmen.

I also examined or attempted to examine correspondence with competitors and with The Cement Institute between such companies and those individuals or persons.

13543 Q. Whom did you see at the Wabash Company?

A. Harry F. Jennings, secretary of the company.

Q. State whether or not you discussed with Mr. Jennings the manner in which his company used a basing point method of calculating delivered prices?

A. I did.

Q. Will you tell us what Mr. Jennings told you about that?

Mr. Leisure: I object.

By Mr. Wooden:

Q. What you said to him and what he said to you.

Mr. Leisure: I object to the question until the time and place is fixed.

Mr. Wooden: The time is already fixed.

Mr. Leisure: No, it hasn't been.

Trial Examiner Norwood: Can you fix the time and place?

The Witness: Yes.

Trial Examiner Norwood: Incorporate it in your answer.

The Witness: Yes.

A. I called on Mr. Jennings on November 17, 1936, at the offices of the Wabash Portland Cement Company, First National Bank Building, Detroit, Michigan.

In line with the inquiry I have described, Mr. Jennings told me that his company employed 18 salesmen. In
13544 response to my inquiry as to how prices were arrived at in sales of cement by the salesmen, Mr. Jennings stated that his company furnishes each salesman with the locations of the basing points used by his company in the territory covered by the sales, that his company advises the salesmen as to the base prices at those basing points, and that the company also furnishes each

salesman a freight rate book and leaves it entirely up to the salesman to compute the delivered price at the location of the delivery of the order based on the price at the nearest basing point plus freight, or, rather, that price which will be the lowest considering available basing points plus freight.

Mr. Jennings told me that no other instructions were given salesmen in regard to the prices they should charge for cement.

13549 The witness identified Com. Ex. 2407 to 2411, inclusive, as papers the witness first saw at the time of his interview with Mr. Jennings, who produced them. The papers were given to the witness. They are originals handed to the witness by Mr. Jennings for his
13550 use and permanent possession. The missing portions in Com. Ex. 2410 and 2411 were cut out at the time they were given to the witness. The witness does not know whether the pencil handwriting that appears opposite those spaces was on there at the time he received them or not. He does not know whose handwriting it is; it is not his own. On each paper in his handwriting there is an identification showing that he received these exhibits from Mr. Jennings, together with the date of the interview when he gave them to the witness and the case number under which the investigation was carried. The witness remembers no understanding whatever with Mr. Jennings that these papers would be returned.

Mr. Wooden: I will offer Exhibits 2407, 2408, 2409, 2410 and 2411.

13554 *Examination by Mr. Leisure.*

The portions on Com. Ex. 2410 and 2411 were cut out before they were handed to the witness. He doesn't know whether immediately before or when. He did not ask Mr. Jennings about it. He thinks "if you will let me see this". He assumes they had reference to certain customers and when the customer turned it over to the salesman, probably he preferred his name to be left out of that price quotation, so he didn't even talk with Mr. Jennings about it, as he recalls. That is not his handwriting on here. He does not know whether that was on there when he got it or not.

13556 By Trial Examiner Norwood:

Q. What is it?

A. Do you want me to reply?

Q. Yes.

A. As to these?

Q. Yes.

A. First, as to 2409, this is, according to Mr. Jennings, a sample of a notification of change in price to Michigan salesmen when there yas a change in the base at Saginaw.

Trial Examiner Norwood: Hand it to me.

(Document referred to was handed to the Trial Examiner.)

13557 Trial Examiner Norwood: This company sent it to its salesmen?

Mr. Leisure: It is an inter-office communication entirely.

Mr. Hershberger: And is there any connection?

Trial Examiner Norwood: Informing its salesmen as to what prices to sell at in certain territory.

The Witness: That is right.

Trial Examiner Norwood: How is that relevant and material?

Mr. Wooden: I think it involves the use of the base price at Saginaw; if I am not mistaken, the base point price at Saginaw, and, of course, your Honor, in a case like this there are many things that become significant or material, so to speak, only by reason of their connection with other things. On the face of that, I don't think it has any particular value.

Trial Examiner Norwood: I think that makes it relevant. What is the number of that?

(COM. EX. 2409 was offered and received in evidence.)

13558 By Trial Examiner Norwood:

Q. This 2408 is a letter from whom to whom? What is that?

13559 A. You want me to state now?

Q. Yes.

A. This is a communication handed to me by Mr. Jennings at the time of my interview with him, when he stated it was representative of the same communication sent at the same time to the Ohio salesmen of his company, telling them that his company had information that there were higher prices in the Ohio territory on cement, and asking

that the salesmen pick up the prices and send them in to the Detroit office immediately.

Trial Examiner Norwood: Respondents admit they do that, don't they? Respondents admit they do that, don't they?

Mr. Zimmerman: Sure.

Trial Examiner Norwood: We will hold this one.

13560 2409 is received as marked. Objections are overruled.

2408 I will defer the ruling on until the relevancy appears.

Mr. Leisure: As to 2407, we have no objection. We ask that it be confined, its admission. It is an inter-office communication. We ask that it be confined to the office involved, namely, the Wabash Company.

(COM. EX. 2407 was offered and received in evidence.)

By Mr. Wooden:

Q. Whom did you see at the Wolverine Company, which I believe you mentioned was one company you called on?

A. I saw Mr. John L. Nelson, the sales manager of the company, Mr. Herman Scott, his assistant, and I talked briefly with Mr. Clarence Jones, the president of the company.

Q. State whether or not you discussed with Mr. Nelson the matter of whether or not his company used a basing point method of calculating prices.

A. I did.

Q. Will you state what—

13561 Mr. Leisure: Would you mind fixing the time?

By Mr. Wooden:

Q. Will you tell us what he said, and the time and place?

A. I talked to Mr. Nelson on November 16, 1936, at Coldwater, Michigan, the head offices of the company.

I asked him the territory covered by the sales of his company, and he told me it was Michigan, Ohio, and Indiana; that the plants of his company were located at Coldwater and Quincy, Michigan, and that five salesmen were employed.

I discussed with him the method his company used in making prices on the cement they sold, and he told me that he does not leave it to his salesmen to ascertain the price

at the various locations where his company might be selling cement, but that instead he or his assistant, Mr. Scott, takes the current base price at the points used by his company in making sales and computes therefrom the price to the various delivered points in which his company has interest, adding to the basing point prices the freight to the destination; that he then furnished the salesmen these delivered prices.

Q. State whether or not you had any conversation with Mr. Nelson regarding the use of land grant rates?

A. I did.

13562 Q. Will you state what he said on that subject?

Mr. Leisure. I make the same objection.

By Mr. Wooden:

Q. (continuing) And what you said?

Mr. Leisure: I make the same objection.

Trial Examiner Norwood: Objection overruled.

A. I noticed in going through certain correspondence or bulletins from the Cement Institute with the Wolverine Portland Cement Company, that it appeared to me

13563 that The Institute was asking its members to furnish them with land grant rates.

I asked Mr. Nelson the purpose of this and whether this was the fact.

He replied that The Institute had been gathering from all of its members various land grant rates, and he added that the reason for this lay in the fact that certain cement manufacturers—let me change my statement. I will put it another way: That the rate varied between different points using land grant rates according to which routings were used; that certain cement manufacturers who were members of the Institute knew the cheapest routing and others did not. And Mr. Nelson stated that the purpose of the Institute was to compile and disseminate all the information it could with reference to land grant rates and such routings so that all cement companies would be placed on an equal footing in that respect.

Mr. Zimmerman: May I ask the witness a question? I understood you to say "cheapest routine" or—

The Witness: Routings.

Mr. Wooden: i-n-g?

The Witness: i-n-g.

Mr. Zimmerman: Yes. Thank you.

13564 The witness identified Com. Ex. 2412 and 2413 as papers he first saw on the premises of the Wolverine Cement Company at Coldwater, Michigan. They came into his possession (being) turned over to the witness by Mr. Nelson. The witness has identifying marks on the papers; on both of the papers appears in his handwriting the notation that he received them on the date mentioned from Mr. Nelson as well as the case number under investigation.

Mr. Wooden: I offer 2412 and 2413.

13565 *Examination on Voir Dire by Mr. Leisure.*

Q. Mr. Carmichael, I understood you to say you saw this paper, 2412, at the Wolverine Company. You made a copy of this?

A. Yes.

Q. And left the original? Isn't that what you meant?

A. It is a copy. What I am trying to determine is whether they made it while I was on the premises or we made it in our office.

Q. It is a copy?

A. It is a copy.

Q. Of the one that you saw there?

A. Yes. I did not speak accurately.

Q. And that also applied to 2413? They showed you a carbon copy of a letter, did they, and you made the copy or they made a copy?

A. I am quite certain that they made the copy for me on the premises at the time of my interview.

Mr. Leisure: We have no objection to either of these except that they be confined to the Wolverine Company.

13566 (COM. EX. 2412 and 2413 were offered and received in evidence.)

Direct Examination (Resumed) by Mr. Wooden.

Q. Mr. Carmichael, whom did you see when you called at the Peerless Cement Corporation?

A. John C. Dunn, traffic manager of the company.

Q. Where and when did you see him?

A. I saw him at the head offices of the company in the Free Press Building, Detroit, Michigan, on November 18, 1936.

Q. State whether or not you had any conversation with Mr. Dunn regarding the subject of his company's method of pricing.

A. I did.

Q. Will you state what you said and what he said about it?

A. I asked Mr. Dunn the method his company used in pricing the cement it sold.

He told me that in the sales of cement by his company in the territory covered by its sales through its nine salesmen, which included the Lower Peninsula of Michigan, Ohio, as far south as Columbus, and Indiana to Indianapolis, his company furnishes its salesmen with a list of basing points used by his company which also shows the base price at those locations; that his company also
13567 furnishes the salesmen a freight rate book, and that it then leaves it up to the salesmen to compute the delivered prices of cement at any point where a customer may be obtained.

The witness identified Com. Ex. 2414 as a paper that was given to him by Mr. Dunn when he interviewed him at the time mentioned. It is either a copy prepared by Mr. Dunn or it is an original that he had in his file that he turned over to the witness. The Witness's belief is that it is the latter. In the witness's own handwriting it has the notation that he received it from Mr. Dunn on the date mentioned.

(COM. EX. 2414 was offered and received in evidence.)

13568 Q. Mr. Carmichael, whom did you see when you made the call upon the Aetna Portland Cement Company?

A. Albert E. O'Neill.

Q. Who is he?

A. Auditor for the company.

Q. Where and when did you call on him?

A. I called on him on the 18th and 19th of November, 1936, at the head offices of the Aetna Portland Cement Company in the Union Guardian Building, Detroit, Michigan.

Q. State whether or not you examined any files of the company.

A. I did.

Q. What files?

A. I could examine only the general alphabetical files,

and the files of one year with the Cement Institute. That was all that I was permitted to do.

Q. Did you ask for the privilege of examining any other class of files?

A. I did.

Q. What other request did you make?

A. I asked to examine the files with competitors.

Q. What did Mr. O'Neill say as to that?

A. He said that his company had no files with competitors.

13569 *Cross-Examination by Mr. Leisure.*

Q. Did he tell you why they had none?

A. No, he did not.

Q. Did you ask to examine any files at the home of one Mr. Cree, any Aetna files?

A. No, I did not, because Mr.—

Q. I didn't ask you "because." I asked you whether you did or not.

A. No.

13571 Kansas City, Missouri,
January 13, 1939.

13573 (COM. EX. 2388 and 2389 were offered and re-
13574 ceived in evidence.)

13575 L. T. SUNDERLAND, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am President of the Respondent the Ash Grove Lime & Portland Cement Company and have held that position approximately 20 years. I have been in the cement business 52 years, 22 years as a jobber, distributor and retail dealer, and 30 years as a manufacturer.

The respondent company has one cement mill at Chanute, Kansas, which went into production in 1908. The Ash Grove Lime and Portland Cement Company of Nebraska is affiliated with the Ash Grove Lime and Portland Cement Co. and it has a mill at Louisville, Nebraska. The

13576 affiliation is merely stock ownership. The majority of the stock of the Nebraska company is owned by the Ash Grove Lime and Portland Cement Co. in main. The Louisville, Nebraska, mill went into production in 1929. The capacity of the mill at Chanute is about one and three quarters million barrels annually and at Louisville about one and a third million annually.

Q. What is the sales territory in which each disposes of its product?

A. Well, that overlaps somewhat.

Q. All right. Give us an idea of the scope of the territory on the outer edges.

A. Well now, what are you talking about, Mr. Wooden? Will you let me hear the question again?

Trial Examiner Norwood: Read it.

Q. (By Mr. Wooden) The selling territory.

13577 A. Of what?

Q. Of each mill.

A. Of each mill?

Q. Yes.

A. Well, the territory of the Chanute mill is principally,—because it does go outside of this territory that I shall describe,—the states of Colorado, Kansas, Nebraska, Minnesota, Iowa, Missouri, Arkansas, Oklahoma, somewhat in Louisiana, occasionally some in Illinois.

Q. Does the Chanute mill sell in all that territory, do I understand?

A. It sells and ships in some of that territory; some of all of it.

Q. Where does the Louisville, Nebraska, mill sell its product?

A. Nebraska and South Dakota, a little in Kansas, little in Missouri, Iowa and Minnesota, generally.

Q. You spoke of your having handled cement years ago as a jobber.

A. Yes, sir.

Q. Has the jobbing of cement passed out of existence?

A. It has with us.

Q. Do you know of it being handled on a jobbing basis anywhere?

A. No, I do not.

13578 Q. How long ago was it that you acted as a jobber of cement?

A. Well, up to the time that our Nebraska mill went into production.

13579 Q. (By Mr. Wooden) Mr. Sunderland, when you operated as a jobber of cement did you buy the cement outright?

A. Sometimes bought it outright. We always 13580 bought it outright, yes.

Q. (By Mr. Wooden.) When you bought it outright did you buy it f.o.b. mill?

A. Sometimes and sometimes delivered, depending upon who could figure the best freight rates, because that was before the Elkins Bill of the interstate commerce law became operative.

Q. Did you frequently buy it f.o.b. mill?

A. When we could handle the freight rates, yes, we did.

Mr. Leisure: I think it should appear that this happened some thirty years ago. It doesn't show in the record when it was.

Trial Examiner Norwood: I think counsel will develop that.

Q. (By Mr. Wooden.) Did the mills, while you were a jobber, sell you f.o.b. mill?

Mr. Leisure: I object to the question unless the time is fixed.

Trial Examiner Norwood: Please fix the time or the approximate time in your answer, Mr. Witness.

A. Well, 35 years ago I would say they did,—30 years ago, sometimes; not always.

Q. (By Mr. Wooden.) And in what territory did you buy cement as a jobber f.o.b. mill?

A. We had at one time exclusive territory for the Atlas Company.

13581 Q. Any others?

A. And for the Iola Portland Cement Company, and we never knew where the cement was going. We would frequently store it along the tracks,—in those days the railroads permitted that without demurrage,—and forwarded it down to our customers whom we had always sold, whether in carloads or less than carloads or mixed carloads at delivered prices.

Q. As a jobber you sold at delivered prices?

A. Always.

Q. As a jobber you bought it f.o.b. mill?

A. Sometimes; not always.

Q. Do you supervise and direct the sales of both the mills that you have named; that is, the Chanute and the Louisville, Nebraska, mill?

A. Well, in my executive capacity I determine the policies.

Q. Is the Ash Grove Lime & Cement Company a member of the Cement Institute?

A. Yes, sir.

Q. Both mills?

A. I can't answer that. The records of the Institute will show, but I can't answer that at this time.

Q. How long has your company maintained a membership?

A. We were a member of the Institute, the Cement Institute, from about February 1, 1930 until about February 1, 1931. We have been a member since about the
13582 middle of 1933, at the time it was reorganized.

Q. Why did you cease to be a member in February, 1931?

A. Well, I don't recall.

Q. Would you say whether or not at that time there was a considerable amount of price cutting going on that had anything to do with your resignation?

A. Well, I can say there was considerable price cutting going on perhaps late 1931 and 1932, but I can't say that that was any reason or one of the reasons why we discontinued our membership.

13583 Q. When you refer to price cutting going on, just what do you mean by price cutting?

A. Well, I mean prices that were less than prices current in the common markets.

Q. Do you mean less than the current prices at given destinations?

A. Less than the current—less than the price current at the markets.

Q. You consider the markets the destination points?

A. Whatever destination points we sought business.

Q. That is what you meant by markets? Destination points at which you sought business?

A. I meant what I said.

Q. Were those current prices at destination arrived at by applying the lowest sum of basing point price plus freight to destination?

A. Well, I can't answer that. I can tell you how we arrived at our prices.

Q. Has either of your mills at Chanute or Louisville, Nebraska, ever been a basing point?

The Witness: Well, now, Mr. Examiner, in order that I may testify intelligently, that I may speak the same language as able counsel, may I make a statement?

Trial Examiner Norwood: Certainly.

The Witness: Our industry, in common, I think,
13584 with many industries—

13587 A. Well, it depends upon what is meant by that term.

By Mr. Wooden:

Q. Well, answer the question in any way you like, stating what you meant by it.

A. Our mills at Louisville—at our mill at Louisville, we have determined from time to time maximum net amount above which throughout our market territory we would not go. In other words, as very succintly stated by able counsel, that would be the ceiling that we would realize on shipments away from our plant locality to our markets.

13589 Trial Examiner Norwood: Yes.

I am going to ask you if you know what is meant
13590 by the term "basing point".

The Witness: I know what is meant by it as an idiomatic phrase of the industry.

Trial Examiner Norwood: State what that is, what you understand it to be.

The Witness: It is what I stated a little while ago.

Trial Examiner Norwood: State it again.

The Witness: With the balance of the answer which I didn't give; namely, it is the maximum net plus the transportation charge to the market when that combination is the lowest price at that market.

Trial Examiner Norwood: Did you intend that as
13591 a description of what a basing point was in contradistinction to a basing price?

The Witness: I meant that to describe exactly what determines a basing point, and as determined by that practice, our Louisville mill is located at a point where the maximum price we establish plus the freight rate to destination, which establishes the lowest price, would make in the parliance of the industry a basing point.

13592 By Mr. Wooden:

13593 Q. When did Louisville, Nebraska, become a basing point?

A. Well, under the description that I have given, it was early in 1931, I think in April, 1931.

Q. Was it shortly after you resigned from the Institute?

13594 A. Well, coincidentally it may have been, but it had nothing to do with it, so far as I know.

Q. And you resigned February 1, is that correct?

A. That is my recollection, about.

Q. Who established or who made Louisville, Nebraska, a basing point?

A. Well, we found on territory quotations from a competitor deducting freight charges to the market points covered by those quotations, checked back to a maximum at our Louisville plant, which was less than we had been charging theretofore, and that was the first time that that condition existed.

Q. You think that was along about in April, 1931?

A. I think it was. I think it was April 18, 1931.

13595 Q. What competitor was it that put in that base price at Louisville?

A. The Lehigh Portland Cement Company. That is, it was the Lehigh Company's quotations that I referred to.

Q. Did you have any notice or warning that such a thing might be done?

A. No, sir.

Q. Is it a fair statement that you were forced to put in a base at Louisville by the act of competitors?

A. Well, we were forced to meet prices we found in the territory, otherwise forego our business.

Q. Prior to the establishment of the base at Louisville how had the Louisville plant been figuring its prices for the several years preceding 1931?

A. It met prices current at destinations throughout its market territory.

Q. Did you ascertain the existence of basic point prices at other points than Louisville?

A. Well, I can't answer that. The probability is that we kept informed right along what the market prices were.

Q. Did you keep informed as to what basic point prices were at other basic points?

A. Well, we would endeavor and would be able to—these quotations that we had that our salesmen picked up in the field and all market territory, they would check

them back in the same way we did at Louisville
13596 and thus determine the maximum our competitors were charging.

Q. Maximum prices at their respective mills?

A. Yes, in the terms that I have explained.

Q. And after you found out what their maximum prices were in the terms that you have explained did you then compound your delivered prices by adding the freight from the applicable maximum price point to destination?

A. We always met the competition as we found it in the market territory.

Q. You didn't go through any process of adding freight to a basic point price to get delivered price?

A. Well, naturally we would, having found the prices in the territory, as I said in answer to a previous question, check them back to determine what maximum realized amounts our competitors were asking, and where those maximum realized amounts plus their freight rates made a lower combination at the destination than ours did we met it and absorbed the difference.

Q. You sometimes add the freight from the basic point to an extent greater than the actual freight from your plant to the actual destination?

A. I don't know what you mean by that.

Q. Well, in those days before Louisville became a basic point what was the point or points that you recog-
13597 nized as being the foundation for the delivered prices in Louisville territory?

A. Well, we recognized the prices as we found them, and sometimes they were determined by some company's policy and sometimes by another company's policy or sometimes by several, depending upon the territory.

Q. Which points did you recognize at that time as points where other companies received their maximum?

A. Whichever ones made the lowest combination, and I can't tell you what that was.

Q. Can't you tell what any of them were?

A. Not without referring to my records, having my memory refreshed, because I can't carry those details.

Q. What is the largest locality in the vicinity of the Louisville plant where you sell cement?

A. What do you mean by the largest locality?

Q. Well, I mean a place where you sell a large quanti y of cement near the Louisville plant.

A. Well, of course, that varies from month to month and from year to year. I couldn't answer that question.

Q. Do you mean to say that you can't give me any idea of where your principal customers are, say, in the vicinity of Louisville?

A. Sometimes in Nebraska, sometimes in Nebraska and Iowa or Iowa, sometimes in Minnesota.

13598 Q. Do you sell a substantial amount of cement into Omaha?

A. Yes, I would say so. I don't know what you mean by a substantial amount. We think anything over a carload is important.

Q. Do you sell some thousands of barrels every year?

A. Well, some years I think we do.

Q. How is the Omaha delivered price calculated?

A. In the manner that I have described.

Q. Is it in the territory where the Louisville mill plus freight makes the lowest delivery cost?

A. I can't answer that. I would be glad to determine that for you, Mr. Wooden, but I can't answer as of today or the present that our maximum plus our freight rate establishes the Omaha price. I can't answer that definitely. I am under the impression that it does, but if you want that information I will be glad to get it for you.

Q. How about Lincoln, Nebraska; does your mill make the delivered price there?

A. I imagine it does. I am not sure, but I imagine it does, yes sir.

Q. Do you have some business close by your mill?

A. Yes.

Q. At Louisville, for instance?

A. Very little; yes sir.

13599 Q. In the days when, or before Louisville became a basic point as you have described it, did you add the freight from some basic point other than Louisville to destination at Louisville to get your delivered price?

A. We met the competitive market as we found it at Louisville.

Q. Is that the way you found it?

Mr. Leisure: I think the question has been answered. He said he met the price where he found it.

Trial Examiner Norwood: This next question is directed to whether that was the way that he found it. I think he has a right to ask it.

Mr. Leisure: Where he found what?

Mr. Wooden: He said he met the delivered price as he found it, and I asked if that is the way he found the delivered price there made up.

Mr. Leisure: Oh.

Trial Examiner Norwood: Objection overruled.

A. Well, I can't tell you how we found it was made up. It might have been made up from one mill plus its freight rate; might have been made up from some other. I can't answer that question.

Trial Examiner Norwood: You didn't know how it was made up?

Q. (By Mr. Wooden) But it wasn't made up from your—

Trial Examiner Norwood: (Interrupting) Wait a
13600 minute. Do you know how it was made up?

A. I don't know now how it was made up.

Q. But when you meet those prices you do find out how they are made up, don't you?

A. Not always. Of course, we know, Mr. Examiner; it is our business to find out.

Q. Yes.

A. From these quotations in the field.

Q. Yes.

A. The combination of the lowest.

Trial Examiner Norwood: Go ahead.

A. And by that process we can then determine what mill point it is that controls or makes or establishes that market price.

By Mr. Wooden:

Q. And do you conclude after finding several quotations that figure back to a certain base, that you may then conclude that that is the base price at that point?

A. That depends on circumstances. We might find a quotation that might not move us, but if we found a large number of them they probably would move us.

Q. Have you learned to recognize that certain points are basic points and certain other points are not?

A. Well, I don't know just what you mean by that. We recognize the competition, whether it is forced by
13601 one mill or whether it is forced by another mill or half a dozen other mills, and we endeavor to meet it at the market place.

Q. Can't you tell me whether you recognize certain mills at certain points as being basic points and certain other mills at other points as not being basic points?

A. We recognize any of the mills at any of the points where that condition exists. It might be Mason City; it might be at Bonner Springs; it might be at any point; might be at Rapid City, South Dakota. It might be in Superior, Nebraska. It might be at Boettcher, Colorado, or it might be at Iola, Kansas; it might be at any one of all the mills that compete in the same market territory that we do.

Q. When you rejoined the Cement Institute in 1933 did you and other mills in this vicinity prepare a proposed code for consideration in connection with the N.R.A. Code?

A. Did our mill and other mills in this vicinity?

Q. Yes.

A. Not that I know of.

Q. What district of the Cement Institute is your mill or mills connected?

A. We are on the Bureau of Mines geographical district known as District 8. That is—yes, both of the mills.

Q. Do you recall whether or not the mills in District 8 prepared a proposed code about that time, 1933?

A. No, I do not.

13602 Q. Do you recall whether or not the mills in this district ever made a declaration against the establishment of basic points at mills by other mills who were not located at that point?

Mr. Leisure: I want to object to that. We are now going into the code period in which certain things were done under the code, and I don't think we should spend time on it in this case. I want to object to the question on that ground.

Trial Examiner Norwood: Objection overruled.

A. I do not, and I don't think it is true.

By Mr. Wooden:

Q. What was the effect upon your mill at Louisville by having a base price put in there by Lehigh?

A. Reduced our earnings.

Q. To what extent?

A. Well now, I can't give you that accurately, but I would think from 25 to 30 cents a barrel, possibly 50 or 60 cents a barrel, depending upon the destination of the cement.

Q. Do you remember what the first base price put in at Louisville was?

A. Yes, sir.

Q. Pardon?

A. Yes, sir.

Q. What was it?

A. My recollection is that these quotations which
13603 I have described checked back to a net maximum to us of $1.10 gross, or a dollar in net. That is after deducting the discount, Mr. Wooden.

Q. Had you done anything that in your mind accounted for the establishment of that base price at Louisville by Lehigh?

A. Accounted in my mind, no, sir.

Q. Had you been cutting prices on any business?

A. No, sir.

Q. Did you ever discuss the matter with any of the Lehigh people?

A. Oh, I protested, probably.

Q. To whom?

A. I think to Colonel Young, who, I am sorry to say, has passed on.

Q. What was the nature and ground of your protest?

A. Well, that I didn't think it was a fair trade practice or fair competition, that I thought, therefore, it was unethical, and that I regarded it in the same relation to the conduct of the cement industry as bushwhacking and guerilla warfare bears to military tactics.

Q. Will you explain wherein you considered it unfair and unethical?

A. Well, it was usurping a right that we considered was ours exclusively and alone without collaboration or conference or consultation with or conversation
13604 with any competitor in the world; that we ourselves had the sole right; so I considered, to determine what maximum amount we were willing to take as our price practice in the conduct of our business.

Q. Well, do you consider, in other words, that you were the only one who had the right to put in a base at Louisville?

A. I certainly do; determining the base as I have described it, Mr. Wooden.

Q. Have you known of other instances in this territory where bases were put in at mills by competing mills who were not established at those points?

A. Well, if I should answer that yes it would be on the basis of hearsay because I don't think I can answer that affirmatively and unequivocally. That is, at present. Perhaps at that time I did know but I can't now say.

Q. Did the Lehigh Company keep up its base price higher at its own mill points at the same time it put in this low base at Louisville?

A. Well, I can't answer that as to dates. I am under the impression that they did not, at least a portion of the time, realize the maximum net at some of their mills than that which was forced upon us in the manner that I have described.

Q. You mean by that that it is your impression that they did keep the price up at their mills while putting it down at your mill, is that it?

A. I didn't say that.

13605 Q. I am trying to understand what you did say.

A. I didn't say that.

Q. What did your previous answer mean? I don't know what it meant.

A. I am sorry. Maybe I can elucidate.

Q. I hope so.

By Trial Examiner Norwood:

Q. You meant they didn't get any more than the net that they were permitting you to make, is that right?

A. Yes, I think that is true, but I can't say that as to dates as to whether that applied all the time that our maximum obtained, and I don't know that it applied to all our competitors, all of that competitor's mills. I can't answer that.

Q. Did Lehigh continue to sell in your nearby territory?

A. Oh, yes, they tried to. They never did a great deal of business there,—were not doing a great deal of business there during that period.

Q. Would that mean that they were taking less net at their mill even than your base price?

A. In our territory.

Q. That is what I mean.

A. Certainly. That is obvious, in that the base price is their maximum.

Q. Did you ever figure out how much below your

13606 base price theirs was?

A. I suppose I did, but I can't give you the figures because I don't remember.

Q. Did it go as low as 75 or 80 cents?

A. I don't remember. I can't give you figures.

Q. Have you given us all respects in which you consider the installation of a base price by an outside mill upon a mill that is not a basic point unfair and unethical?

A. Will you please read that question?

(The question was read by the Reporter.)

A. Oh, it isn't exhaustive or exclusive.

Q. Well, give us some of the—

A. (Interrupting) I could give quite a diatribe if I had time to sit down and do so, but I have given you the essence. You asked me in a general way what the nature of my protest was to Colonel Young, and I gave it to you.

Q. Well, give us some of those details that you haven't covered and which you say can be given.

A. Well, I say that I don't know as I can add anything to what I said at this time.

By Trial Examiner Norwood:

Q. You don't like it, do you?

A. Why, of course not.

13607 By Mr. Wooden:

Q. Did you ever ask, Mr. Sunderland, anyone connected with the Lehigh Company why they put in a base at Louisville?

Mr. Leisure: We had that exact question before the recess, Mr. Wooden, the exact question. The record will show it.

Trial Examiner Norwood: I don't think it was the exact question. My recollection is that it was asked collectively, but he may answer it.

Objection overruled.

A. No, I don't think I ever did. That is almost eight years ago, Mr. Wooden.

Q. Do you know of any cases, Mr. Sunderland, in your experience in the industry where the establishment of a base by an outside mill resulted in putting a concern out of business?

A. No, I can't positively say that I do.

Q. Do you consider that practice has any dangerous potentialities of that sort?

A. It certainly does. It is vicious.

Q. Do you know how it is looked upon by other mills?

A. No, I can't answer that.

Q. You never discussed it with any other mill people?

A. Well, I wouldn't positively say that I never did.

Q. Didn't you find out how they regarded it?

13608 A. Well, I probably did at the time, but my recollection isn't very clear as to just what they said to me.

Q. Can you say whether other mills regard it with favor or disfavor?

A. Well, my impression was that the mills with the most ethical managements regarded it with disfavor.

Q. Well, I suppose we would have to find out what mills you regard as having the most ethical management.

A. Well, those who do business within what is regarded by the industry, and, I believe, by the Commission and the law, the fair trade practices, fair competition.

Q. Well, those are such general terms that they don't mean very much.

A. Well, they mean a whole lot to us.

Q. Can you say whether or not, based on your long experience in the industry and your contacts with other people in the industry, whether or not there is any line of demarcation in attitude toward that practice that we have been discussing between chain mills and smaller concerns?

A. No, not between chain mills and smaller mills or independent mills, but I would say the best thought of the industry, mills that represented the best, the most constructive thought of the industry regarded that sort of industrial warfare with disfavor.

Q. Can you identify some of those that you lump

13609 together as representing the best thought of the industry?

A. Well, I would want to think that over, because my opinions have changed from time to time.

Q. I am not asking for your opinions; I am asking for your recollection.

A. Yes.

Q. As to whom you include in that term.

A. Well, of course, I wouldn't want to have some of my friends in the industry feel slighted because I didn't include them, and, therefore, what I should say will not be exhaustive; it will not be all-inclusive.

Q. Yes.

A. But I would say that the International is one of the highest type, one of the best managed in terms of ethical conduct.

Q. Is that the Lone Star?

A. Of the larger companies, now the Lone Star. That is in respect to this particular thing of which you are speaking.

Q. Yes.

A. Of the large companies, I would say Universal-Atlas represents right thinking. That would be my impression. I think they did at that time. Whether I ever discussed it with Mr. Affleck, I am not sure.

Generally, I think you find that the smaller independent companies, most all of them regard it with disfavor.

13610 Q. Did you ever know of International or Lone Star putting in a base of the sort we have been discussing in Alabama?

A. I don't recollect.

Q. Have you ever discussed it?

A. They have a mill in Alabama.

Q. Spocari?

A. At Spocari.

Q. Have you ever discussed this subject with representatives of the International or Lone Star?

A. I think at the time I discussed it with chief executives of the International; Mr. Bissell, and possibly Mr. Struckman, anyway, Mr. Bissell. They are both gone now, I am very sorry to say.

Q. Did you ever discuss it with Mr. Affleck, of the Universal-Atlas?

A. Did I ever discuss it with him?

Q. Yes.

A. I can't answer that.

Q. Have you discussed it with representatives of the Affleck Company?

A. I don't think I ever did.

Q. Did you ever discuss it with representatives of the Penn-Dixie Company?

A. I don't think that I ever did. Those companies operate largely outside of our market territory; it is

13611 true Penn-Dixie have a plant in Iowa now. I don't think they did—at least, I am not sure that they came

into possession of that plant prior to that time. I am not sure.

Q. You say you protested the establishment of the Louisville base by Lehigh to Colonel Young?

A. That is what I said.

Q. What answer did you get?

A. Well, I can't tell you what the Colonel said, but it wasn't satisfactory.

Q. Can't you tell us the nature of it?

A. No, sir.

Q. Other than that it was unsatisfactory?

A. No, sir, except I wasn't convincing, apparently.

Q. You got no explanation, then, as to why it had been done?

A. No, sir.

Q. Have you held any official position in the organization of the Cement Institute?

A. Now, what do you mean? Have I held any official position in The Institute?

Q. Yes.

A. Or did I have an official position in the organization of The Cement Institute?

Q. Yes. I shouldn't have said that. I meant The Institute.

13612 A. Yes, sir.

Q. Any official position in The Institute?

A. Yes, sir.

Q. What has it been?

A. Well, I think at one time I was a trustee, a district trustee. At one time I was a member of the contact committee, which was a committee of three charged with the duty and responsibility of cooperating with the government under the provisions and purposes of the NRA.

Q. When were you a trustee?

A. Beg your pardon?

Q. When were you a trustee?

A. Well, I think some time in 1933. Now, if you let me refresh my recollection from records or find out, I can tell you, but I don't like to give those dates offhand. I was at some time a trustee.

Q. Since 1933?

A. I think so. Now, I woudn't be sure about it, but I think so.

Q. Have you been active in the organization or carrying on of the organization of any district body that was composed of cement manufacturers, a group, a local group or territorial group, or anything of that kind?

A. Well, I think we probably have been parties to any effort to bring about through cooperative effort
13613 orderly marketing.

Q. What local or district organization of that sort do you have in mind?

A. Well, I have in mind a bureau I think established by Mr. Norcross about 1912, that he called the Norcross Audit & Statistical Bureau, something of that sort.

Q. How long did that remain in existence?

A. I can't tell you that. I don't remember.

Q. Has it been out of existence for some years?

A. Many years, yes, sir.

Q. Was it succeeded by some other organization?

A. Well, it wasn't preceded by—

Q. Succeeded.

A. There have been some since then; therefore, if you mean by that succeeded by it, I would say yes.

Q. What later organizations have there been in this territory?

A. Well, we had—I think there was a Kansas City Cement Bureau.

Q. When did that operate?

A. I couldn't answer from memory.

Q. Is that out of business now?

A. Yes, sir.

Q. Who was the active man in charge of it?

A. Well, I think probably—what do you mean
13614 by the active man? You mean, for instance, was I the active man?

Q. There might have been a number. I assume that some man gave more time to it than anyone else?

A. Oh, yes, there was a Mr. McLain.

Q. Baxter McLain?

A. Mr. Baxter McLain, and who is an attorney conversant with the cement business, and I think had been an official, been in official capacity connected with the International of New York, and prior to that I think with the Iola Company in Iola, Kansas. That is my recollection.

Q. Did the district of the Cement Institute succeed to

the affairs or activities of the predecessor local group, the Kansas City Bureau?

A. I think that the Kansas City Cement Bureau of the Cement Institute succeeded to the Kansas City Cement Bureau. That is my recollection.

Mr. Wooden: Will you read that back, please?

(Answer read.)

The Witness: The Kansas City Cement Bureau of The Cement Institute.

By Mr. Wooden:

Q. The Kansas City Cement Bureau, then, as I understand, operated for a time as a bureau of The Cement Institute?

A. Well, the Institute's activities, I think, out here in this group began with the Kansas City Cement
13615 Bureau of The Cement Institute, succeeding the Kansas City Cement Bureau.

Q. And since the district organization of The Institute followed, has there been any other local or territorial organization of the cement mills?

A. I don't know of any; at least, I don't recall any.

Q. You said these various organizations had endeavored to promote orderly marketing?

A. Correct.

Q. What specifically did they do?

A. What specifically? Well, the encouragement by precept and example of fair trade practices.

Q. Will you be a little more specific? Tell us what the specific things were.

A. Well, I would say anything and everything that was within the law and not without the tenets of our bureau or Institute.

Mr. Wooden: Your Honor, at this time I would like to offer in evidence, or, rather, reoffer in evidence exhibits for identification, No. 140-5 to 140-13, being a code of ethics of the Kansas City Cement Bureau, which was identified in Washington by Mr. Millwee, as, I believe, furnished him by Mr. Lundborg of the Cement Institute.

The Witness: You want me to look at this?

13616 Mr. Wooden: You may.

The witness has connected the activities of that organization sufficiently to warrant it being offered at this time, I would say.

Trial Examiner Norwood: Let counsel see it first.

The Witness: I beg your pardon?

Trial Examiner Norwood: Mr. Sunderland, let the counsel see it.

(The exhibits referred to were handed to respondent's counsel.)

Examination on Voir Dire by Mr. Leisure.

Q. Mr. Sunderland, there is some handwriting in the top corner of this proposed exhibit, which says "Proposed by K. C. but of no value." Is that in your handwriting, that writing at the top?

A. No, sir; no, sir.

Q. I notice at the bottom of the last page, there is a place for a date. It says ..... day of ....., 1929," then there is a place for four signatures where it says "The undersigned are members", and there is no signature on it.

Do you know whether it was ever adopted or used in any way?

A. No, I don't.

13617 Mr. Leisure: Well, we make the same objection that we have heretofore made. Here is just a piece of paper. It does not indicate that it was ever adopted or used by anyone. I submit it is incompetent, irrelevant and immaterial.

Mr. Zimmerman: May I see it a moment?

Trial Examiner Norwood: I didn't understand that counsel had asked this witness to identify it.

Mr. Wooden: No, I haven't. It has been identified before.

Mr. Leisure: If he has not asked this witness to identify it, it certainly isn't competent to go in evidence, because it has not been identified as having been used by the Kansas City Bureau in any way, or, for that matter, as having come from there.

13618 Q. (By Mr. Wooden) Showing you, Mr. Sunderland, papers marked for identification, Commission's Exhibit 140-5 to 140-13, inclusive, do you recognize
13619 those papers as copies of the Code of Ethics of the Kansas City Cement Bureau?

A. I do not.

Q. Did you have a code of ethics of the Kansas City Cement Bureau?

A. I can't answer that definitely. I think likely we did, but I can't answer definitely. I think we had—what do they call those?

Q. This paper is headed "Kansas City Cement Bureau, Code of Ethics".

A. I said I wasn't sure of that.

Q. (By Mr. Wooden) I beg your pardon?

A. I said I wasn't sure of that.

Q. Well, all right. Have you looked over these papers sufficiently to satisfy yourself that you do not recognize them as anything that you have ever seen before, or a copy of?

A. These are supposed to be photostatic copies.

13620 Q. Oh, yes. Just disregard the distinction between a copy and the original.

A. I don't know that I have ever seen anything of this character or papers that would purport to be the originals, even.

Mr. Wooden: Your Honor, I will, nevertheless, rest on my offer on the identification of Mr. Milwee—did I say it was furnished him by Mr. Lundorg? I should have said Mr. McConnell. And I should like, in making the offer, to suggest or ask that it be stipulated that the writing in the upper left hand corner of the first page is that of Mr. Luther G. McConnell.

Mr. Leisure: A while ago you said it was Mr. Lunsborg's.

Mr. Wooden: If I did I misspoke myself.

Mr. Leisure: We can't stipulate to Mr. McConnell's writing without giving me a chance to check it. I don't know whose writing it is. That is why I asked this witness.

A. I don't know.

Mr. Wooden: Meanwhile I make the offer of other portions of the document other than the handwriting.

Mr. Leisure: We do renew our objection on the offer, Your Honor.

Trial Examiner Norwood: Yes.

13621 Mr. Leisure: I think it is very clear that it has not been connected in any way.

Trial Examiner Norwood: I would like to look at the record.

Mr. Wooden: I stated it correctly the first time, not the second time. It was Mr. Lundborg, not Mr. McConnell.

Trial Examiner Norwood: Was there any testimony—

Mr. Wooden: (Interrupting) I am speaking from memory. There was testimony by Mr. Jones as to the source of the document.

Mr. Zimmerman: Not the handwriting.

Mr. Wooden: Not the handwriting.

Mr. Zimmerman: No.

Mr. Wooden: So I will return to my original statement, that it was from Mr. Lundborg that we originally obtained it. I haven't the records available.

Trial Examiner Norwood: I should like to look on the record on that and see what condition it is in. Would counsel like to retain this in the meantime?

Mr. Wooden: Yes.

Q. (By Mr. Wooden) Mr. Sunderland, you mentioned Mr. McLain as the man in charge of the Kansas City Cement Bureau.

A. Yes.

Q. Did he continue in charge of the Kansas City 13622 Division of the Institute?

A. Yes, I think he did.

Q. Where is Mr. McLain now?

A. Well, I don't know whether he is in a hospital or whether he is at home; whether he is able to be out.

Q. He is in Kansas City?

A. The last I knew he was. I don't know whether he is now or not.

Q. Are you familiar with his signature?

A. Well, I don't know that I could say that I am. I ought to be. Whether I am or not I am not sure.

Q. I show you a paper that has been marked for identification as 1081-M. Do you recognize the signature there as that of Mr. McLain?

A. Well, that looks a good deal like his signature, but I wouldn't say positive that that letter was signed by him, but it does look like his signature.

Mr. Wooden: Your Honor, I will offer this at this time not only on the identification just given by the witness but on the identification of Mr. Tackett on the record to the effect that this letter was—it is a photographic copy of a

letter received by him from the attorney representing the Consolidated Cement Corporation in Washington, an attorney by the name of Appel.

13623 Trial Examiner Norwood: Any objection?

Off the record.

(A discussion was thereupon had off the record.)

Mr. MacIntyre: I believe the record should show that where Mr. Wooden said "Consolidated Cement Corporation" it should be Cowhan Engineering Company. Mr. Appel represented the Cowhan Engineering Company.

This is off the record.

Trial Examiner Norwood: Off the record.

(A discussion was thereupon had off the record.)

Mr. Leisure: I view of the witness's identification and of the fact that it is written on the letterhead of the Kansas City Cement Bureau we make no objection to the exhibit as to identification. We do think it is incompetent and irrelevant, however,—immaterial. We make that objection.

Mr. Zimmerman: I have nothing to add to Mr. Leisure's objection.

13624 Q. (By Mr. Wooden.) I believe you said you thought the Kansas City Cement Bureau had a code of ethics, Mr. Sunderland?

A. That it may have had.

Q. Was any attempt made to put into that document a declaration of what the Kansas City Bureau thought constituted unfair practices?

A. There may have been, but I can't answer that definitely.

Q. Do you remember any of the things that were classed as unfair in this territory?

A. Well, I would say that anything that was in violation of fair practices and fair competition as often defined by the Federal Trade Commission.

Q. You don't mean to say, do you, that you confined yourself to defining things as unfair that had been defined as such by the Federal Trade Commission?

A. Well, I would say that they were confined to activities that didn't involve directly or indirectly any agreement to fix or freeze prices or coerce competitors or restrain competition or restrict trade.

13627 Q. Now, Mr. Sunderland, in your long experience in the industry haven't you known of diversion of shipments being used by customers to divert the car

into a higher priced delivered price territory at a lower price?

13628 A. Why, certainly I have known of diversions that were made in the interest of the people who diverted them and contrary to our contract and our policy.

Q. You are aware of the effect of diversion on delivered prices?

A. And we tried to avoid them by contractual relation.

Q. And you are aware of the effect on delivered prices of diversion of cars?

A. We were aware of the effect upon our treasury of cars that were diverted to some point where we got less than our market price at that point.

Q. Didn't you get the same amount on that car no matter where it was shipped?

A. No sir. That is, when I say the same amount, we didn't realize the same net at all points.

Q. Well, you got the amount on which the original sale was figured, didn't you?

A. Possibly so.

Q. And what difference did it make where that car went as to the amount that you got out of that car?

A. Makes a difference between our price at that point and the price at the point at which we contracted with the dealer to buy it.

Q. And so it resulted in lower delivered prices at the point where you didn't intend it to be lower, is that right?

A. If it resulted in depriving us of part of our profit we were opposed to it.

13630 Q. (Interrupting.) Your mill net thereupon becomes fixed, doesn't it?

A. Of course, the mill net is what is left of the delivered price after deducting freight. That is correct.

Q. Then what difference does it make to you in your mill net where the car goes?

A. I will answer that by saying it makes the difference between our delivered price at the point at which we contracted to deliver it and the delivered price at the point to which it is diverted.

Q. Makes a difference in the delivered price but not in the mill net?

A. I didn't say that.

Q. I am asking you if that isn't right?

A. Well, of course, if one nets us more than the other, there will be that difference.

Q. Isn't your mill net the same after the delivered price is figured and the car is shipped,—isn't the mill net the same regardless of where that car goes?

A. It is the same if a man bought a car from us delivered at a certain point, and the price at which we sold it, when deducting the freight, would determine the minimum net that we would get on that particular shipment; and if he diverted it to a point where our delivered price
13631 would yield us a larger net he would rob us of that difference.

Q. He might divert it to a point where you had a smaller net, might he not, and yet a higher delivered price?

A. Well, I can't answer that.

Q. Well, you are a man that knows this business. Why can't you answer that?

A. I don't know as I know it in your terms, Mr. Wooden. I can't remember all details. I have no desire to evade the question at all if I can answer it.

Q. Isn't the point of your testimony right here that it has an effect upon future delivered prices at that point?

A. Not at all; not at all; has no relevancy.

Q. Have you found that other cement mills in this territory also regarded diversions as an unfair trade practice?

A. Well, now, I don't think I can answer that. I would think that they would for the same reasons that we do.

13632 By Mr. Wooden:

Q. Mr. Sunderland, when you make up an invoice for a shipment of a car to a certain destination, do you have on the invoice the delivered price?

A. Yes, sir.

Q. Do you have on it also the amount of freight from your mills to the destination?

A. The estimated freight.

Q. Estimated from what?

A. Estimated from our—the rate figured on the number of pounds in the car.

Q. Estimated? Why not the actual amount?

A. Well, that is what it should be, but sometimes they collect a different amount.

Q. You intend to make it the actual amount, do you not?

A. Well, we hope that they won't overcharge us because if they do we have to go to the trouble and expense of putting in a claim to collect it back.

Q. You put on the invoice the best information you get as to the actual tariff rate?

A. We put in the estimated freight charge.

Q. Based on railroad tariffs?

A. Yes, sir.

Q. And does the purchaser deduct the amount of the freight? Is the purchaser then allowed to deduct
13633 from the face of the invoice the amount of freight shown thereon?

A. He is under his contract with us obligated to return us the freight bill, whatever it is, and then the difference between the freight bill and the amount of the invoice is what he sends us in cash.

Q. And pays the railroad the difference?

A. As our agent, he pays the railroad the freight and sends in the freight bills as part payment of the invoice.

Q. Isn't the amount that you are to receive from the buyer fixed at the time you make the invoice out to him?

A. Well, it is determined in the manner that I have stated to you.

Q. And you are entitled to get that by your agreement with the buyer, aren't you?

A. We believe so.

Q. You get that same amount regardless of whether that car would be diverted, wouldn't you?

A. Well, we might and we might not. It depends where it is diverted to, but we are entitled to that; in response to your question I said yes, under our contract for delivery at that particular point.

Q. Yes.

A. But not if delivered at some other point.

Q. But you will get that same amount even though it were diverted to some other point?

13634 A. We might and we might not.

Q. You are entitled to it, aren't you?

A. We are entitled to at least that from that customer because he has contracted to pay us not that price but the delivered price stated on the invoice.

Q. The customer does not actually pay the delivered price, does he?

A. I beg your pardon?

Q. The customer doesn't actually pay you the delivered price, does he?

A. He certainly does.

Q. I thought he paid the railroad freight?

A. As our agent.

Q. Oh!

A. I so stated.

Q. Do you have a contract making those parties your agents?

A. In that respect, we have a contract that they will pay the freight for our account and send it in as part payment of the invoice.

Q. In what form is such a contract put?

A. Well, I can't tell you that. I think it is in our printed form.

Q. Will you produce one of your printed forms?

A. Delighted.

13635 Q. That contains that proviso?

A. I think so.

13636 Q. Mr. Sunderland, have you yet produced that form?

A. I turned it over to the counsel, Mr. Leisure.

(A document was thereupon handed to Mr. Wooden.)

A. For your convenience, I have underscored in red the particular things that you referred to, on both sides.

Mr. Wooden: Will you mark this, please?

(The documents referred to were marked "Commission's Exhibit 2415-A and 2415-B" for identification.)

By Mr. Wooden:

Q. What is the paper I show you Mr. Sunderland, marked 2415 for identification?

A. It is a sales contract used by respondent Ash Grove Lime & Portland Cement Company.

Q. Is that for a specific—is it a specific job contract?

A. That is right.

Q. What percentage of your sales are made on

13637 this type of contract.

A. Well, I would say quite a large amount of cement was sold under that contract.

Q. What proportion?

A. Well, I couldn't answer that.

Q. Is half of it made on a specific job contract?

A. Well, as to the Chanute mill I would say less. As to the Louisville mill I would say it was more than that.

Q. What form of contract do you use on the shipments that are not made on a specific job contract?

A. Order forms that are substantially the same as that.

Q. Do they contain the exact provisions that have been marked in red on this form?

A. I can't say that they do. I don't know.

Q. Will you produce one of those?

A. If you want one I will be glad to. Both of them are in accordance with my testimony.

Q. Will you point out any provision in 2415-A and B that provides that the buyer shall be your agent?

A. Yes, sir. It is implied.

Q. Implied, you say?

A. Yes, sir.

Q. There is no specific provision of that sort, is there?

A. Well, it doesn't put it in just that phraseology. I would like to read the clause I refer to. May I?

13638 Mr. Leisure: Counsel asked him for it. I think he should be permitted to read it.

By Mr. Wooden:

Q. Yes, you can point that out.

Trial Examiner Norwood: Are you going to offer that?

Mr. Wooden: I didn't intend at this time to offer it, but as far as that particular paragraph is concerned I have no objection to him reading it in answer to my question.

Trial Examiner Norwood: Go ahead.

A. "Where delivered prices are made transportation charges per tariff applied from shipping point to place of delivery shall be paid by the buyer and original paid freight bills thereto sent to seller promptly for credit."

There is another clause I have marked there for you, Mr. Wooden.

By Mr. Wooden:

Q. Bearing on that point?

A. Bearing on diversions.

Q. Yes. I see that.

A. Yes.

Q. Has your mill at Chanute, Kansas, ever been a basing point?

A. Well, in the sense that I described, I think

13639 that our maximum prices established from time to time have never been controlling as to the delivery prices. That is, didn't establish the lowest prices at des-

tination except possibly a few points. So that in the broad sense I would say no, but in the technical sense to the extent that it did do that I suppose it is so termed, as you call it, but I do not regard it as a basing point.

Q. You think the usage that is commonly referred to in the industry as basing point is a misnomer, do you?

A. Indeed I do.

Q. In the sales territory of your Chanute mill have you been accustomed to base your delivery prices to some extent on Independence, Kansas?

A. If the Independence, Kansas, maximum net plus its freight rate to the market place established the lowest price at that place, yes.

Q. Well, could you say whether that was the case?

A. I cannot.

Q. You don't know whether or not the Independence, Kansas, base price ever governed the delivered price in that territory?

A. I do not recall.

Q. How was the price set at Chanute, Kansas, made up?

A. What do you mean, made up?

Q. How was it calculated?

A. Well, it is a matter of judgment. We deter-
13640 mine it in the relation to all factors that might be considered relevant. It would depend somewhat upon what our neighbors were doing. We have to meet competition, and we determine price with reference to getting the maximum price that we can in our judgment and at the same time meet competition at the market place.

Q. Have you added freight from Independence to Chanute in calculating your delivered prices at Chanute?

A. I didn't say we did.

Q. You say what?

A. I did not say we did.

Q. I asked you if you did.

A. I said that if Independence—

Q. (Interrupting) I am not asking you what you said. I am asking you what you did.

A. We determine our prices by what we find in the field that we have to compete with.

13641 Q. You never recognized Independence, Kansas, as a basing point?

A. I didn't say that.

Q. I am asking you now if you did.

A. I don't, no. I told you I didn't, no. If those conditions prevailed we did.

Q. I believe you said that Chanute, Kansas, had not been a basing point in the sense that you have described the term?

A. I said only in the degree it might have been—some small degree, but not in a broad sense.

Q. In what degree? Will you explain that?

A. I might have determined the lowest price at some little town around Chanute. I don't recollect, but it might have done so, if it did, to that extent.

Q. Do you recall that it did make the lowest price at any point?

A. No, I do not.

Q. When you sold in Oklahoma did you recognize any Oklahoma base point price in selling?

A. Well, we sold Oklahoma in the same way we did anywhere else.

Q. Well, my question was whether you recognized any basing point prices in Oklahoma?

A. Well, if there was one and it determined the lowest price in the market we did, and I will say broadly
13642 that that would apply anywhere throughout our territory and to all mills that might bring that about.

Q. Did you know there were basing point mills in Oklahoma?

A. When?

Q. At any time.

A. Well, I think there have been at times prices in the field that were set, as it were, as the lowest prices at the market places by some maximum price that some mill in Oklahoma had plus its freight to that point.

Q. Were there some mills in Oklahoma at any time within your knowledge that were not basing points in the sense you have just described?

A. Well, sometimes yes and sometimes no.

Q. Which mills in Oklahoma have you known to be basing points and which mills have you known not to be basing points?

A. Well, I didn't—that isn't quite—that isn't quite in harmony with my answer. There are two mills in Oklahoma, Mr. Wooden. Sometimes one of them may have been a mill whose maximum price plus its freight to some des-

tination points or market places established a price. At other times that might not be true.

Q. Those two mills, one at Dewey and one at Ada, Oklahoma?

A. Yes, sir.

Q. Do you know whether or not any base price was ever put in at either of those mills by another mill that
13643 wasn't located there?

A. Well, I can't answer that categorically, Mr. Wooden.

Q. Didn't you watch those things in the course of your business to see what was going on?

A. Certainly we watched the price structure the best we could because we were interested in knowing what the price was at the market place so we could compete with it.

Q. You referred to the price at your Louisville mill, I believe—

A. (Interrupting) Yes, sir.

Q. (Continuing) —as your maximum price?

A. What is it?

Q. The price at your Louisville mill as your maximum price?

A. I don't understand your question, Mr. Wooden.

Q. Didn't you refer to your price at the Louisville mill as your maximum price at that mill?

A. I said that there was at Louisville a price, but not a price but a maximum net.

Q. Didn't you say maximum price?

Mr. Zimmerman: I don't understand the witness did at all. What he described was merely his price base or structure.

Trial Examiner Norwood: Let's let the witness say whether he said that or not.

Mr. Leisure: He is trying to.

13644 Mr. Wooden: The record will show that.

Mr. Zimmerman: All right. Then let the record show right now.

By Mr. Wooden:

Q. Well, what do you say, Mr. Sunderland? Did you say that you had a maximum price at your Louisville mill?

A. Well, I don't think I put it in that way. If I did I should not have because we establish now the maximum net, which, when added to the freight rates to a certain

market territory, determines the lowest price at the points affected thereby.

Q. If you had a maximum price at your Louisville mill, as I think the record will show, what was your minimum price at the Louisville mill?

A. I don't know. There was no market at our mill and, therefore, we don't make prices on that.

You have some maximum and minimum prices?

A. Well, the minimum would vary.

Q. Depending on what?

13645 Trial Examiner Norwood: Answer the question. Upon what would the variance of the minimum depend?

A. Well it depends upon the condition of our order book, the prospects for business, state of the market, whether the business involved would be something we wanted to hold or whether it was just sporadic business. It could depend upon anything as a matter of judgment to be exercised at the time on what we think is its merits. Now, we never have a minimum or maximum price at our mill.

By Mr. Wooden:

13646 Q. Wouldn't it depend, wouldn't it's variance depend upon the distance into which you shipped, the freight rate that had to be met?

A. No, not necessarily. It depends upon our competition at the market place, and varies. Sometimes it comes from one direction and sometimes from another.

Q. Does it depend upon the amount of freight that you had to absorb, so to speak?

A. It might and it might not. It is not always so.

Q. Aren't your mill nets the actual prices realized at your mill?

A. They are not prices at all, no sir. The only prices we make are destinations, or delivered at some destination.

Mr. Wooden: Will you mark this, please?

Q. Showing you a paper marked for identification as 2416-A and 2416-B, is that your signature to the paper?

A. That is my signature, and I will confess that I have, along with other members of our industry, fallen into the use of idiomatic terms that were not accurate when analyzed etymologically.

Q. In other words, the same usage that I have adopted in my questions?

13647 A. Yes, sir; and I think it doesn't express etymologically and literally the truth in regard to the way the business is done.

Q. Is this your letter?

A. That is my signature. I don't see the letter. I didn't read it.

Mr. Wooden: I offer it in evidence.

Trial Examiner Norwood: What is that marked?

Mr. Leisure: This is 2416-A and it is dated April 22, 1930.

Now, we have had a great deal of discussion here about documents of the Federal Trade Commission being confidential. This is a letter between the witness and the Federal Trade Commission. If it is going to be used in a case later against the witness I think there should have been some showing that it was intended at the time the correspondence took place.

Mr. Wooden: The correspondence took place during a time when the Commission was carrying on an investigation of the cement industry directed by the United States Senate.

13651 (COM. EX. 2416-A and B was offered and received
13652 in evidence.)

13653 Q. Mr. Sunderland, do you know any way in which you can determine whether a given sale of yours is made at or below cost or above cost except by comparing it with your mill net on that sale?

A. Comparing a sale with our mill net?

Mr. Wooden: Read the question.

(Question read.)

A. Well, it would be very difficult to determine whether one sale was sold at less than cost.

By Mr. Wooden:

Q. Assuming you wanted to determine and knew what your cost was, do you know of any way of determin-
13654 ing whether the sale was at, below or above cost except by comparing it with your mill net?

A. Well, now—

Mr. Zimmerman: I want to object to that question because it is an unfair assumption. Anyone who has any knowledge of business at all knows that you cannot determine costs until the end of your accounting period, whatever that may be. You can't determine your costs

from minute to minute or day to day. If he knew what his cost was, he would compare it with his cost.

Trial Examiner Norwood: Does the counsel contend that the Commission's attorney has no right to assume that the cost is known and base the question thereon? That the mills do never find out what the costs are?

Mr. Zimmerman: Oh, that isn't in the question at all. He says that which is perfectly obvious. If you knew what your cost was. Then is there any other way of determining whether the sale that he has made is above or below cost except by comparing it with his mill net. Well, now, any school child would know that if you knew what your cost was—

Trial Examiner Norwood: Yes.

Mr. Zimmerman: —and you knew what your selling price was, you could tell whether that price was above
13655 or below cost by simply comparing it with the cost.

Mr. Wooden: That is what I am getting at.

Mr. Zimmerman: Not the mill net.

Trial Examiner Norwood: Therefore, the counsel would have a right to ask the question. The objection is overruled.

Mr. Leisure: Your Honor, I wanted to interpose another objection. He is assuming a hypothetical question, and he assumes a state of facts which are not in the record and which do not tend to bring out any facts in the case. It calls for the conclusions of the witness, and even if it were the type of question on which a hypothetical question could be framed, it does not conform to any such rule, because it is not based on anything in the record, and, therefore, I want to add that objection to the objection already made.

Trial Examiner Norwood: The objection is overruled. Now read the question and let him answer.

(Question read.)

Trial Examiner Norwood: Now, on the record.

(A discussion ensued off the record.)

Trial Examiner Norwood: Now read that question, and I hope counsel will not interrupt until he anwers.
13656 (Question read.)

Trial Examiner Norwood: That is, by comparing the cost with the mill net.

A. Well, yes, there are other factors.

By Mr. Wooden:

Q. What are they?

A. Costs of sales.

Q. I am taking the total cost, of course.

A. Well, if we knew what the total cost was at the time we made the sale, it would be merely a mathematical calculation, but we never know what cost is on any sale because that sale itself might affect the cost of a particular shipment shipped on it.

Q. You know what your average cost is, I take it?

A. We know at the end—we know at the end of the year.

Q. What your average cost per barrel is?

A. What our average sales cost.

Q. All costs?

A. I should—excuse me—our cost of sales per barrel at the end of the year.

Q. Don't you know at the end of the year what the cost per barrel for all items inclusive of all items is?

A. The average cost?

Q. Yes, per barrel.

A. Yes, sir.

13657 Q. Do you also calculate the average mill net return by the year in barrels?

A. Well, the average mill net return would be one element, would, of course, be one of the factors that we would consider.

Q. Do you calculate each year the average mill net return?

A. Well, I can't say whether we do or not, but we can.

Q. Isn't it a practice in the industry to do it? To calculate their mill net return, average mill net return?

A. I can't answer that.

Q. Hasn't it been the practice with your company to do it?

A. Well, I am not sure that it has. It may have been.

Q. Who would know if you don't know?

A. Well, I suppose I could find out.

Q. Don't you already know, Mr. Sunderland, that you had a practice of calculating your average mill nets year by year?

A. Well, I doubt if we do. I think we have a practice of calculating our average mill cost, but I don't think we do as a practice calculate our average mill net realized from all our sales. I doubt if we do.

Q. Haven't you supplied such information to the Commission or its representatives showing average mill nets?

A. I don't know.

Q. For years?

13658 A. Average realized mill net, I think perhaps we have.

Q. Yes.

A. And if we had, for that reason we might undoubtedly have calculated them to cover the period for which they asked for.

Q. Haven't you had a practice to calculate it for your own private business purposes?

A. I said I don't recall that we had.

Q. Do you know any way in which you can determine whether your year's operation has shown a profit or a loss above cost or with relation to cost except by comparing your average barrel cost with your average barrel mill net?

A. That is a rather confused question.

Q. I don't think so.

A. I don't know of any way that we can determine our profit or loss without knowing our total sales' cost.

Q. Your total cost of all sorts, isn't it?

A. Our total "cost of sales". I don't mean to say it is sales cost, because that is one element of our total "cost of sales".

Q. Don't you have to know your total cost to compare with your total price in order to determine whether you have sold at a loss during the year or not?

A. Don't I have to do what?

Mr. Wooden: Read the question.

(Question read.)

13659 A. No, we would determine whether or not we had made any profit by deducting the total cost of sales, including all expenses.

Q. Production expense?

A. From the total amount realized.

Q. The total amount realized is your total mill net, isn't it?

A. The total amount realized is the total sum that we get as proceeds from sales net after all deductions.

Q. And it is a comparison between that and your costs that determines or shows you whether you have made a profit or shown a loss; is that right?

A. I told you the way we arrive at our profits, by

determining the total cost of sales including all elements of cost, administrative, selling, all expenses.

Q. Producing cost, too?

A. And taking the sum total of that and comparing it with the total amount realized in our business.

Now, I might perhaps explain that a little bit. I can explain that when I say we are in the lime business and in the cement business, and we cannot and do not allocate and divide all of our costs of sales to either one of them. Therefore, it would be impossible for us to determine the actual cost of sales of just cement alone.

Q. Do you have any record in your concern or
13660 keep any record that shows the total amount of freight on your cement shipments during the year?

A. Well, I would think we could determine by doing the necessary amount of clerical work the total amount of freight we pay for our account on our shipments.

Q. You could do it, but do you keep that record regularly as to how much it amounts to?

A. I don't think we do.

Q. You haven't included it in your cost figures that you refer to?

A. I have what?

Q. You have not included the freight in your cost figures that you refer to?

A. Why, certainly, that is part of the total cost of sales. We can't sell a man a car of cement at the market place and not include the cost of getting it there as part of the cost.

Q. Well, is it cost that passes through your books?

A. What is it?

Q. Is it a cost that you assume and pay?

A. Well, I can't tell you just exactly how we handle it, but however we handle it in our accounting, that is what it is. It is part of the cost of the sale.

Q. Well, then, in that case, whenever you sell at a delivered price, it includes the freight? You are always
13661 selling at cost; is that right?

A. We are always selling at what it cost the customer, yes, sir.

Q. And you never get a profit, if that is your cost?

A. What is it?

Q. You never get a profit if that is what you sell at?

A. Well, I hope we do. We don't always, no, I am sorry to say.

Mr. Zimmerman: The witness hasn't at any time said, if the Examiner please, that he sells at cost, and it is not fair for Mr. Wooden to attempt to put such words in the witness' mouth.

Trial Examiner Norwood: Well, I don't think the witness has agreed to that. I think he has made that clear. Go ahead.

By Mr. Wooden:

Q. Showing you a paper marked as 870-6H, for identification, Mr. Sunderland, is that your signature or facsimile signature at the bottom of the page?

A. Well, that is—I think I wrote my signature there.

Q. You recognize the letter as yours?

(Pause.)

Trial Examiner Norwood: You don't have to read the letter to see whether it is your signature, do you?

13662 The Witness: No, but he wanted to know whether I wrote the letter, and I will have to see it.

Trial Examiner Norwood: Oh, I see. I beg your pardon.

The Witness: I am sorry.

(Pause.)

A. Yes, sir.

Mr. Wooden: I offer it in evidence.

Mr. Leisure: We have no objection except that we ask it be confined to the company against which it is offered.

Trial Examiner Norwood: Any further objections? Received as marked. The objection is overruled.

(COM. EX. 870-6H was offered and received in evidence.)

Q. Mr. Sunderland, directing your attention to the fourth paragraph of your letter, which is Exhibit 870-6H, you say "It is well known that such statistics have been misused." Will you specify wherein these statistics of the Cement Institute had been misused.

A. Well, I was doubtless referring to a certain practice which I have always objected to, the revelation to

13663 competitors of individual information furnished to the statistician as to stocks, production and shipment. And, as I stated in this letter, it always results in, and naturally results in constant irritations. If it showed we were doing more business than some jealous competitor, who was doing considerably less, he would feel, naturally,

that either his sales department was derelict or for some unfair reason we were getting more business than we should.

On the other hand, the effect upon the fellow that is in that situation would be that he might gloat over it and make fun of his competitor who was not able to do that, and it was just—it would be just a sort of constant irritation. That has been my experience, and it is based on my knowledge of human nature. I cannot tell in any case where it specifically has been abused. That is what you asked me.

Q. And yet you say in your letter it is well known that it has been abused.

Now, you don't know it so well, or what?

A. I think it is an abuse, and I undoubtedly had that in mind.

Q. Well, didn't you say it was well known that such statistics had been abused?

A. Well, that is what the letter says.

Q. Yes. Or "misused" I believe is the word.

13664 A. Yes.

Q. Do you mean by that that you knew then, well knew then that it had been misused, but you don't know now? Is that what you mean?

A. I may have had—

Mr. Leisure: I don't think that is necessary. The witness has told us very plainly what he meant by that statement. He has explained. I don't see any occasion for asking him now whether or not he isn't saying something different. He said exactly what he meant by it.

Trial Examiner Norwood: I think he can ask for an explanation. I don't see why not. I can't think of a single reason.

Objection overruled.

By Mr. Wooden:

Q. I am just asking you to give some details to back up your statement in this letter that it was well known that such statistics have been misused.

A. I can't give you any details.

Q. Were such statistics ever misused with reference to the Ash Grove Company?

A. Well, I think they are misused when they are revealed to competitors.

Q. Do you mean that there is a potential mis-
13665 use of them? Is that what you mean?

A. No, I think it is a misuse of them when they are revealed to competitors.

Q. I believe you said they were revealed under the system that was then being used?

A. They were during part of the time.

Q. You said that the revelation of such matters to competitors tended to make a mill who was not increasing its business suspicious of the man who was increasing his business?

A. I did.

Q. Is that right?

A. And that has been my observation all my life. It is just a phase of human nature that shows itself under those conditions.

Mr. Leisure: I thought the word was "jealous" and not "suspicious," Mr. Wooden.

Mr. Wooden: Well, all right. The witness has adopted that.

The Witness: I said "jealous" in my first answer.

By Mr. Wooden:

Q. Did you also say that it tended to make other mills think that the mill that increased its business had done so by unfair methods?

A. Tended in that direction; yes, sir.

13666 Q. Did you mean to include in your term "unfair methods" that of price cutting?

A. Well, that would be one. It might be that method, and there might be some other way of endeavoring to increase business without adhering to fair competition or fair trade practices.

13667 Q. You go on in this letter, Exhibit 870-6H, to refer to objections that had been registered with the trustees of the Institute against the revelation of individual statistics.

Had you registered such objections?

A. Why, I have objected many times. I have always objected to the revelation of that sort of information.

Q. Did you object to it when it was provided for under the N.R.A. Code at the time?

A. I always objected to it.

Q. At the time it was proposed, I mean.

A. I always objected to it, under the code, before the code, subsequent to the code.

Q. You say objections had been registered both formally and informally. Did you register objections both formally and informally?

A. Well, I don't know. During this period and some time or other, undoubtedly we registered in written form, but whether it was in written form or orally, that has been my position ever since I have been in the cement business and where there were any statistics gathered.

Q. Did you have anything like that in your statistics of the Kansas City Cement Bureau? A provision to do that?

A. No, sir.

Q. A revelation of individual statistics?

A. No, sir. It was prohibited. If we had any
13668 provision of that kind, it would have been prohibited because we never would have consented to anything of that kind.

Q. Did you look upon that statistical work and the revelation of individual statistics as tending to prevent an increase in the business of a particular company?

A. Oh, I wouldn't say that. I would say it stimulated it.

Q. Stimulated it?

A. Stimulated their efforts.

Q. To increase their business?

A. Stimulated the efforts of the shippers that do less business than they think they ought to do to get more business. I think that would be one of the tendencies, one of the results, one of the psychological reactions to that sort of information.

Q. Do you recall any occasion when you discussed that matter with trustees of the Institute?

A. Well, I don't recall any times, no.

Q. I don't mean times particularly, but do you recall having had the discussion?

A. If I recall it? I don't recall approximately the time, and I can't recall even the fact, if it was a fact.

13669 Q. Did your company decline to continue furnishing statistics for your mills?

A. We did.

Q. On what grounds did you discontinue furnishing them?

A. I beg your pardon?

Q. On what grounds did you discontinue furnishing them?

A. Well, back of our declination was the thought that I have expressed here, the reason that I have expressed here. And, I also expressed a reason that we believed it was illegal.

Q. Has there been any specific harm result to your company from it?

A. Well, that is rather intangible and I couldn't give you any specific case.

Q. What is your belief in regard to it?

A. Well, I believe that when we have been fortunate enough or enterprising enough to do a larger amount of business than some of our competitors, our jealous competitors thought we ought to do, doubtless it would result in activities of theirs that were harmful to us.

Q. What sort of activities?

A. Efforts by various and sundry means to get more business.

Q. Did those efforts by sundry means include the cutting of your prices?

A. I would say one of the means resorted to was chiseling.

13670 Q. And by chiseling you mean what?

A. I mean any unfair method of securing business that otherwise wouldn't flow to the one that secures it.

Q. You mean to include in the term "chiseling" the cutting of prices?

A. Well, of course, cutting a market below the price current without it being designed to reduce the market is just one kind of chiseling.

Q. Were the statistics collected and disseminated by the Institute withdrawn from your company after you discontinued reporting your own figures?

A. Well, I think they were. They doubtless were, because we couldn't very well expect to get what we wouldn't give, and willing that other people should receive with respect to ourselves. I think the answer to your question is yes. That is my recollection.

Q. Did you ever have any competitor express any objection to you to your increasing your volume of business?

A. Well, I don't know that I could answer that in just those terms.

Q. Well, in what terms could you answer it?

A. Well, I would say that over the years competitors from time to time on occasions may have expressed the feeling that we were getting more business in proportion than they were.

13671 Q. In proportion to what?

A. Well, in proportion to the business that was done.

Q. The business that was available, you mean?

A. The Bureau of Mines, you know, furnish statistics of all shipments from all the companies every month.

Q. You mean in proportion to the total business available?

A. In proportion to the total business done, yes.

Q. In other words, if you were doing at one time ten percent, say, of the total business available, have you had objections to increasing it, say, to 15 percent?

Mr. Leisure: I think we ought to have the time and place fixed. We have no way of following the testimony of these broad and general statements.

Trial Examiner Norwood: Read the question.

Mr. Leisure: And the surmises.

(The question was read by the Reporter.)

Trial Examiner Norwood: I don't see how time and place has anything in the world to do with that question.

Mr. Leisure: Well, if the witness answers that he doesn't know, something of the sort may have happened and then counsel goes ahead and asks questions based on the details in that answer such as we have just had. It isn't bringing out facts and we should be concerned with facts. It is just a hypothetical discussion between counsel and the witness as to what might have hap-

13672 pened, but there is no showing that it did happen.

Mr. Zimmerman: There is another very slight objection to the question, which I think Mr. Wooden would correct. It has a sort of double meaning. It isn't clear when he says "Have you had objections." It isn't clear whether he means did the witness object or did others object to the witness.

Mr. Wooden: The latter is what I meant.

Mr. Zimmerman: I thought it was.

Mr. Wooden: Have you received objections.

Mr. Leisure: Well, Your Honor, will you allow me to add to my objection that the entire subject matter of these questions for the last ten or fifteen minutes with respect to allocation of business is entirely outside the is-

sues of this case, so that not only are we dealing with surmises and speculations in the form of the question, but the subject matter is not included in these pleadings in any way.

Trial Examiner Norwood: Read the question.

(The question was read by the Reporter.)

Mr. Wooden: "Received" instead of "had."

A. You mean had I had objections to increasing ours from 10 percent to 15?

By Mr. Wooden:

Q. No. Have you received objections from com-
13673 petitors to your increasing it from 10 to 15 percent?

A. I don't recall that I ever did have in that specific way.

Q. Of course my percentages were just entirely hypothetical. You understand that.

A. I thought it was.

Q. Have such subjects come up for discussion in meetings at which you have been present with competitors?

A. Well now, Mr. Examiner, may we define what I understand to be meetings?

By Trial Examiner Norwood:

Q. Don't you understand what the word "meetings" means?

A. I know what I understand a meeting to be.

Q. What do you understand it to be?

A. I understand it to be a formal gathering conducted with a chairman and presumably with a secretary to keep the minutes of what was accomplished at the meeting.

Q. How would you define the words "informal meeting"?

A. Well, I would say conversations and conferences and discussions. If I discussed there would have to be somebody to discuss it with.

By Mr. Wooden:

Q. Now, will you answer the question with regard to—having in mind both possible interpretations of the word "meetings"? Answer it both ways.

13674 A. I do not recall that the matter was ever discussed at any meeting the way I would describe it, and I don't recall ever discussing it or having conversations about it, although it would have been perfectly nat-

ural for me to because, if I am going to object to something or if I am going to consider and get an exchange of views or get an idea or express an idea I have got to do it with somebody else.

13678 Q. I am showing you a paper marked for identification as Exhibit 1081-BB. Do you recognize that, Mr. Sunderland, as one of the types of adver-
13679 tising that your company once used?

A. That looks like one of our ads, yes.

Q. How long since you have used advertising of that sort?

A. Well, as I said a little while ago, Mr. Attorney, in a general way we have always used that type of advertising; we may have changed some claims, not because we had at any time reduced the actual quality or value of our product, but perhaps relatively we couldn't sustain the claims after competitors meeting the condition had measured up to our standards, or approximately so.

Q. How long since you have advertised publicly that your standard cement far exceeded the minimum requirements?

A. I think we do it now.

Q. All right.

A. I answered that once before just that way. Now, I would like to say, if I may, that when I talk about standard I am talking about commercially, competitively.

Q. When I am talking about standard cement I mean the standard specifications of the A. M.—what is it? A. S. T. M. Is that what you understand it to mean?

A. Yes, sir. If we don't measure our cement or exceed it we couldn't sell the Government five cents worth, or any other customer who was informed. We get no credit with the Government on doing much better than the specifications.

13680 Q. Will you provide us with samples of that advertising?

A. Yes. I have made a note of it, Mr. Wooden.

Trial Examiner Norwood: Five minute recess.

(A short recess was thereupon taken.)

Trial Examiner Norwood: Go ahead.

Mr. Wooden: Your Honor, I wish to offer at this time papers previously identified and marked for identification as 1081-W, 1081-DD, 1081-EE, 1081-X, 1081-Y, 1081-Z,

1081-AA, 1081-BB, which the witness has been shown and further identified, and 1081-CC.

These papers were identified in Washington by Mr. Tackett as photographs of papers that were provided him by the attorney Appel from the files of the Cowham Engineering Company. They all relate to this subject to which we have gone into recently.

Trial Examiner Norwood: Any objection?

13681 Mr. Leisure: As to this first exhibit, your Honor, 1081-W, it is written by a non-respondent, Portland Cement Association.

I have just read it. The subject matter has nothing whatever to do with the testimony of this witness; unless it is connected up in some way with this case, I must object to it, incompetent, irrelevant and immaterial.

Mr. Wooden: By reading the date and other things, I would say that this document, 1081-W, does refer to the same matter, because it has reference to the chairman of the committee on cement specifications, Charles F. Conn, to whom other correspondence, some other correspondence, is addressed shortly afterward.

Mr. Zimmerman: When the Examiner is finished, I would like to see it.

Mr. Leisure: Mr. Conn isn't in the witness chair at the moment. He was chairman of the Portland Association, not for The Cement Institute. That is entirely outside of the record or the issues in this case.

Mr. Wooden: I believe Mr. Reiter testified that 70 per cent or more of the membership of the Association consisted of members of The Institute. Is that right?

13686 Mr. Leisure: I want to state further objections to the offer that has just been made, your Honor.

Examiner Norwood: Yes.

13687 Mr. Leisure: I am now referring to Exhibit 1081-AA, CC, X. Y. Z.

Mr. Leisure: It seems to be a collection of excerpts made from newspapers and various prices that are gathered together. For instance, 1081-X starts with "Alpha says in the New York Stock Exchange listing papers" and Lehigh says "In the New York Stock Exchange listing papers." It gives below what is said. And then it gives that "The International says in a booklet sent to stockholders." I think it is obvious that even if these things

could be admitted, you would have to produce the originals and not just excerpts from them. It may not all be here. We have a right to see the quoted parts here with its proper context with the rest of the writing, whatever it may be, and the same objection goes to AA and CC. I don't know what they are, and a—they certainly have not been properly identified.

13694 By Mr. Wooden:

Q. Mr. Sunderland, you frequently used the expression today of meeting competition at the destinations where you delivered your product.

A. At the market place, yes, sir.

Q. You mean by that that you endeavor to make your delivered price the same as that of your competitors at the given destination?

A. Well, we have always endeavored to get the highest market price for our products.

Q. Does it mean that you endeavor to make your delivered prices the same as your competitors?

A. We endeavor to meet.

Q. And by meeting them you mean making them the same?

A. Well, we wouldn't want to discredit our product or be charged with being a chiseler by quoting a lower price.

13695 Q. You think it would discredit your product if you sold a cent under the market at a given destination?

A. I think it would unless that quotation was designed to reduce the market, but if it was designed to take advantage and get an order that we couldn't get at the market, then I would say we were chiselers and that the effect would be of that policy to discredit our materials and our claims for them.

Q. You mean to say that no product is ever sold at less than others sell it—

A. (Interrupting) I did not say that.

Q. (Continuing) —without discrediting them?

A. I didn't say that.

Q. You mean to say that as to cement?

A. What is that?

Q. You mean to say that as to cement; you can't sell cement for less than the market without discrediting it?

A. As to our cement, yes sir.

Q. Wouldn't your quality be just as good as ever?

A. What do you mean, would it be just as good as ever?

Q. I mean after you reduced the price, or chiseled, as you say, wouldn't your quality be the same?

A. Well, we never reduced the quality of our product for any reason, and we don't chisel, and I can't conceive of such a situation, either horn of the dilemma that
13696 you mentioned, as being consistent.

Q. You just don't believe anybody can do such a thing as sell at less than others are selling it, is that right?

A. Oh, no. I didn't say that. They do, but we don't.

13697 Q. They shouldn't?

A. Well, in my opinion they are digging their own grave industrially speaking.

13698 Kansas City, Missouri,
January 16, 1939.

13699 Mr. L. T. Sunderland is recalled for the Commission.

13702 (COM. EX. 1081-F and 1081-U, was offered and received in evidence.)

Mr. Zimmerman: I have just finished reading them, Your Honor. My objection, in addition to what has already been said, is that they don't seem to have the slightest relationship to any issue under the complaint. They are entirely a matter of encumbering the record.

Trial Examiner Norwood: Go ahead.

By Mr. Wooden:

Q. Mr. Sunderland, showing you papers identified in the record as Exhibits 971-14Z, 971-15A and 971-15B, is that your letter to Dr. Arthur R. Burns?

A. Why, it looks like it.

Q. Do you recall writing the letter?

A. Well, I recall writing implications of that
13703 character to Mr. Burns.

Q. Will you explain what underlies your statement in this letter as follows: "The absorption of mills into chains has frozen the chain mills price policies upon all independent mills in the districts affected"?

A. Well, I mean it has usually been the larger companies who have led in the establishment of prices at the market places and, therefore, that froze, as it were, the independents to meet the condition where they had to meet those prices. We were helpless; we couldn't get any more.

Q. You didn't want to take any less?

A. Well, of course, probably we didn't. For the Ash Grove Company I will say we never want to take any less.

Q. Well, do you mean by that that the chain mills are recognized as the price leaders in the industry?

A. Well, not in those terms, Mr. Wooden, but over the years, if my memory serves me rightly, it has usually been some one or more of the larger companies who have led, especially in price reductions.

Q. You go on to say in this letter that such policies had apparently been determined by nationwide rather than local district considerations.

A. Yes sir.

Q. Can you say what you meant by that?

A. Yes sir. These so-called chain companies,
13704 some of them have mills that extend practically across the country and in their intra-company policies it has seemed to me that they considered them as a whole and not with reference to conditions that might obtain in a particular district: for instance, where we were interested. Our market territory is comparatively circumscribed to the entire markets of the chain mill companies.

13705 Q. Mr. Sunderland, you then in this letter, 9711-5A, refer to the price debacle of 1931 and then go on to say that there had been no absorption of the mills into chains in Kansas recently but in earlier years the mills at Bonner Springs, Iola and Independence were thus absorbed. What did you mean by "thus absorbed"?

A. Well, I said there had been no absorptions as, whatever the statement is there, but during the period I mentioned these mills were thus absorbed.

By Mr. Wooden:

Q. What did you mean by "thus absorbed"? How were they absorbed?

A. Well, I didn't have reference to how. I had reference to the fact.

Q. Well, what do you mean by the word "thus"?

A. Well, it has no implication to me other than I have explained, Mr. Wooden.

Q. Did you mean that low base prices had been put in at those mills and then later they were absorbed?

A. No, sir, I did not.

Mr. Zimmerman: May I ask, do you mean by
13706 that in the sense that they were taken over by competitors?

Mr. Wooden: Yes, sir.

A. It was merely a historical fact.

13707 Q. You still stand by your statement of last Friday, that you knew of no instances where independent mills have been taken over after having low base prices put in at their points by outside mills?

A. Well, now, Mr. Wooden, I stand by the statement, that I know of no places where mills were taken over as a result of efforts, through depression of the market, of competitors to acquire them. That is what I meant by that statement.

Mr. Zimmerman: Well, may I ask, Mr. Wooden, is it convenient to refer us exactly to the statement which he made? Was it exactly as you have just now stated it?

Mr. Wooden: I would say so.

Mr. Zimmerman: I didn't recall it just quite like that. I thought the gist of it was—

Mr. Wooden: I might have indicated a quote.

Mr. Zimmerman: —that no mill had been put out of business or forced to go out of business or taken over as a result of that.

Mr. Wooden: Well, that might be. I wouldn't say about that.

By Mr. Wooden:

Q. Showing you, Mr. Sunderland, Exhibit No. 828-6T to 828-7H, inclusive, minutes of a meeting of Districts 5, 7 and 8 of The Institute at Chicago, on June 23, 1933, does that show your attendance? Do you recall being there?

13708 A. Well, I don't recall, but my name is there.

Q. Well, then,—

A. What was the date of that, if you please?

Q. June 23, 1933.

A. Yes.

Q. Then calling your attention to 828-7G, do you find

there a declaration that it is unfair competition, and unfair trade practice for a manufacturer to establish a maximum base price at the mill of a competitor

A. Yes, sir, that appears here, and I believe that is true, but I don't think that was approved by that meeting. That is my recollection.

Q. As a matter of fact, wasn't it moved by Mr. Gray and seconded by Mr. Tyler, that the code be recommended or adopted as above shown?

A. Well, I don't remember that, and I don't remember that this was adopted. I don't know.

Q. Who was Mr. Gray?

A. Well, I presume it was the Mr. Gray of the Louisville Cement Company of Louisville, Kentucky. I only know that Mr. Gray in the industry. There may be others.

Wasn't that, Mr. Wooden, during the code period or during the period when the industry was asked to prepare for codes?

Q. It was during the preparation period, I would
13709 say, June, 1933.

Do you recall any of the discussion that went on at that meeting regarding that particular subject?

A. No, I do not, Mr. Wooden, except that was a provision that was rather close to my heart after what happened in 1931, and I don't think that it was so close to the hearts of some other members of the industry.

Q. In your mind, does that account for the fact that no such declaration went into the code as finally approved?

A. Well, I wouldn't say that, because there were a number of things that were submitted during the process of dealing with the NRA to secure them, that were not allowed and were not included in the code.

Q. Mr. Sunderland, what information do you provide your salesmen with when they go out to sell cement?

A. We give them little loose-leaf books of convenient size for their pockets that contain a list of the towns in their respective territories and the delivered prices at those towns.

Q. Do they carry any of the Institute freight rate books?

A. No, sir.

Q. Do you use The Institute freight rate books in calculating delivered prices?

A. We do not.

Q. Have you ever done so?

13710 A. No, sir.

Q. How do you calculate the freight element in your delivered prices?

A. Our traffic department furnishes our sales department with the rates.

Q. Do they furnish them the rates from points that you recognize as basing points?

A. They furnish them the rates from all points in which that department is interested in the marketing of our products.

Q. That is, the sales department?

A. I beg your pardon?

Q. By "that department" you mean the sales department?

A. The sales department; yes, sir.

Q. Well, the traffic department doesn't figure the freight from your mill at Chanute to destinations in all cases for the purpose of making the delivered price lists?

A. Our traffic department figures the rates from all points in which the sales department is interested to all market points.

Q. Have you considered using this freight rate book of The Institute for such purposes?

13711 A. What do you mean "considered"?

Q. I mean, have you considered using it and then decided not to?

A. We never have used it, and, therefore, we never decided to use it. We always decided, if we thought of it at all, not to.

Q. You didn't think it necessary to use it in your business, either, for sales?

A. No, sir.

Q. Or shipping?

A. No, sir. We have a well equipped traffic department in charge of one of the best experts, I suppose, in the country, and he has able assistants, and we check our own rates, and it was not an unusual thing, and we did get The Institute's rate book—it wasn't an unusual thing for him to find errors, and if he found a discrepancy between his interpretation of a tariff and the rate given in the book, our rate that he determined from the railroad freight tariffs was the rate that was used.

Q. You say it wasn't uncommon for him to find errors in The Institute freight books?

A. There were not infrequently discrepancies between the rates as he figured them and those contained in the rate book.

Q. Who is your traffic man?

A. Mr. W. S. Barton.

13712 Trial Examiner Norwood: Well, did I understand you to say that you didn't use The Institute's rate books at your office, either?

The Witness: Well, I didn't say we didn't have them. We did subscribe for the freight rate books and freight rates, yes, sir; we did.

Trial Examiner Norwood: And check rates by them, your traffic man?

The Witness: Well, that was one check we had. That was only one check, but they never determined our rates.

By Mr. Wooden:

Q. In the cases where you found differences between the rates in the Cement Institute book and the way your traffic department figured them, what did you do in such a case?

A. Why, I think the traffic manager, if he did his duty, would exhaust all resources he had to determine the accuracy of his interpretations, and he would likely write to the Freight Bureau and ask them where they got the rate and how they figured it.

Q. The Freight Bureau of The Institute?

A. Yes.

13713 Q. And in the event that you still didn't find—couldn't reconcile his rate with the Institute rates, then what?

A. Well, if they couldn't show authority we still used our own freight rate as interpreted and found in the railroad freight tariffs and our own traffic department.

Q. Would that sometimes put you into certain destinations at lower delivered prices than if figured according to The Institute?

A. It may have done so.

Q. Do you know whether it did?

A. Well, I can't answer that. It would be strange if, over all the years, with such a complicated mess as freight tariffs, that that wouldn't occur.

Q. Wouldn't that put you in the position where you might be charged with chiseling if your delivered prices were under that of others figured according to other freight rates?

A. Well, when I mentioned the other day about being charged with chiseling I had in mind being charged by the trade with not being consistent, with making flesh of one and fish of another.

Q. You mean that such cases that you just referred to where delivered prices turned out differently because of different freight applications, that such would not be regarded as chiseling?

13714 A. Well, I wouldn't regard it as chiseling. An error isn't a reprehensible thing with human beings who are as apt to err as those in our company, and myself included.

Q. Do you know whether that is the way such things are regarded in the trade?

A. Well, I can't answer that. I would think so. That is the way I would regard it.

Q. Do the delivered price books which your salesmen carry, say in the State of Missouri, show the points of shipment, various mills points of shipment?

A. No, sir.

Q. Do the price books show any points of shipment?

A. I don't think they do.

Q. When you make up the delivered price books for Missouri, we will say, do you include in it the freight rate from your mill at Chanute or your mill at Louisville, Nebraska?

A. Well, of course, all shipments that we make from Chanute to any destination obviously include the cost to us of getting the shipments to destination.

Q. I am speaking—

A. (Interrupting) I know; but, when you say are those prices figured on the freight from Chanute I would say they are figured as I told you last week: They are figured on the basis of the lowest combination that

13715 we could find, a maximum net plus freight rate to the destination involved.

Q. And when you speak of maximum net you refer to what is frequently referred to in the industry as a base point price, don't you?

A. Yes, that misnomer, basing point price.

Q. Has it been your experience, Mr. Sunderland, that the price of cement on a delivered basis enabled your mill to go into a wider territory than it would otherwise?

A. Well, of course, I think, Mr. Wooden, that there are two different things involved in your question.

Q. All right. Answer it in any way you like.

A. Assuming that we could realize the same average net by some other manner of pricing or some other price practice, I would say that per se had no effect upon the extension of our territory.

13720 Q. Do you recall an interview, Mr. Sunderland, with Mr. John H. Bass, representing the Federal Trade Commission, in November, 1936?

A. I remember a man by the name of Mr. Bass who represented the Federal Trade Commission being one of the men who called on me, yes, sir.

Q. Have you read Mr. Bass' testimony about his interview with you?

A. Well, I think I have read excerpts from it, abstracts.

Q. Did you read that portion of his testimony in which he testified that you had told him that the establish-

13721 ment of a base at Louisville, Nebraska, was the result of an agreement among various competitors?

A. I read that and that is not accurate, Mr. Wooden.

Q. Will you make such corrections as necessary to make it accurate?

A. Well, first, I will say that I didn't think at that time, I haven't thought since, and I don't think now that the action of Lehigh Company in setting maximum net at our mill through their delivered prices throughout our local trade territory was then under or by reason of any agreement with any competitor. I think they were playing the lone wolf in that proceeding.

13722 Q. And you don't think you told Mr. Bass any such thing as that?

A. No, I do not. I couldn't have, because, obviously, I couldn't have sat in on such an agreement—if I didn't sit in I wouldn't have known it, and if I didn't know it, I wouldn't have told him that I did, that it was so; and I am positive—I deny categorically that I said anything of that kind to Mr. Bass.

13724 Q. The other day I asked you about meetings with competitors. You defined meetings in two different ways.

A. Yes, sir.
Q. One of a formal meeting with a Chairman.
A. Yes, sir.
Q. And minutes and so on.
A. Yes, sir.
Q. You have attended both kinds, have you?
A. Oh, yes.
Q. Have you attended meetings of the informal kind?
A. Well, I attended conferences and I have had discussions and conversations over the years. I don't suppose that I could enumerate them.
Q. Have you sometimes had these informal meetings following—immediately following the adjournment of the formal meetings?
A. Well, it might be that there have been. I wouldn't say there were not. I think in all probability it would be perfectly natural that there should be because we can't have discussions without somebody to discuss with, and when there are formal meetings there are usually parties present who—perhaps it is some long distance where I am, usually.
13725 Q. Have you discussed on such occasions informally with your competitors questions regarding prices and price competition?
A. Well, I imagine that in my conversations I have discussed all matters that were pertinent and of common interest in our industry,—I imagine that I have.
13726 Q. And "common interest" would include such subject as—
A. Why, common interest would be anything that affected all of us.
Q. Would it include prices and price competition?
A. Well, of course, we would be quite vitally interested in prices and price competition, and terms and conditions, general outlook in the industry, and the general conditions in the industry. It would be quite natural that I would have conversations with regard to any phase or aspect of our industry that would seem to me to be of common interest.
Q. Showing you, Mr. Sunderland, papers previously marked, for identification, as 1905-A to F—
A. 1905?
Q. A to F, inclusive. Have you seen papers like that before?

A. This is not the date line?
Q. No.
A. Excuse me.
Q. Have you seen papers like that before?
13727 A. Well, I can't state that I ever saw this before, or a paper like it.

By Mr. Wooden:

Q. Did you ever see papers in the form and of substance like that?
A. Well, I don't know that I have or not.
Q. Or Exhibit 2197-A to—
A. What is this?
Q. —A to F, inclusive? Have you seen anything like that before?
A. Why, I don't know that I have. There are subjects here that I would be interested in, but I don't recollect ever seeing a paper like this.
Q. Can you say whether or not it is in accord with the policy followed by your company?
A. No, I couldn't say that without checking with the facts.
Q. Is your com, any a member of District No. 8
13728 of The Institute?
A. Well, our mills are in District No. 8, Mr. Wooden.
Q. Showing you Exhibit 1022-RR and SS, do you recall anything about the matters that are covered by that exhibit?
A. Well, I don't recall the meeting referred to here, and I don't know whether I was present at it.
Q. Do you recall a matter that is referred to, or the matter that is referred to here? This is addressed to the members in District No. 8.
A. I recall the subject of handling of certain classes of business like WPA business. We had the dealers and their organizations on one hand, and we had our own situation on the other, and I think that there were some things done in line with what is mentioned in that letter there in respect to somebody going to Washington to discuss the matter with the government. I think that is probably so.
Q. But this refers to certain developments in Oklahoma.
A. Well, it might have had—
Q. What was the Oklahoma development?

A. I can't tell you that. I don't think it would be any different from the developments anywhere else except it may have come to notice a little earlier, but I can't say what particular reference it has.

Q. You don't know the location in Oklahoma of this particular development?

13729 A. No, I do not know.

Q. Or any of the parties involved?

A. No, I do not know.

Cross-Examination by Mr. Leisure.

Q. Mr. Sunderland, I think you said that you had been a manufacturer of cement for some 35 years?

A. Yes, for 30 years.

Q. And that before you were a manufacturer you had had experience as a jobber?

A. Yes, as a jobber and distributor and retail dealer, both.

Q. I think you said that while you were acting as a jobber, you purchased cement from manufacturers?

A. Oh, yes, we purchased cement.

Q. Cement.

A. Yes, sir.

Q. Now, with respect to that, on page 13580, Mr. Sunderland, Mr. Wooden asked you this question, to which you made the following answer:

"Question: Did you frequently buy it f.o.b. mill?

"Answer: When we could handle the freight rates, yes, we did."

13730 Would you mind explaining to the Examiner what that expression "handle the freight rates" means?

A. Well, prior to the enactment of the Elkins bill, which was an amendment to the Interstate Commerce Commission Act, freight rates were not published, freight rates were not adhered to by the railroads, and we were frequently able to secure special rates. Sometimes a manufacturer could secure better rates than we. In those instances we bought delivered, and in other circumstances we settled with them on a net basis.

Q. You said also you purchased at delivered prices. Can you fix the earliest date at which you purchased cement at delivered prices?

A. Oh, well, in the late 90's, or in the 90's, we purchased cement from the Atlas Portland Cement Company, shipped from Coplay, Pennsylvania, and North Hampton, Pennsylvania, at delivered prices at Omaha.

13731 Q. Does that go back as far as 1890?

A. Well, it is in the early—yes, in the 90's, perhaps in the early 90's, but, anyway, in the 90's.

Q. Now, you said you told him also that one time you were a member of the Kansas City Bureau of the Cement Institute. Is that Bureau still in existence, Mr. Sunderland?

A. No, sir.

Q. I think you said that you did not recall the time when you did not attempt through contract provisions to prevent diversion of your cement. You said you considered it unfair for a customer to divert shipments in violation of his contract. Is that a fair statement of your testimony? I haven't attempted to—

A. (Interrupting) I think I said it was in violation of contractual relations, and also that I considered it unfair competition.

Q. Would the diversion of your cement—will you explain whether it would or not—the diversion of your cement by one of your dealers have any effect on your business with your other dealers?

A. Oh, yes; and that is one of the reasons for our undertaking to control our own business. Customer psychology is a very delicate thing, and in dealing with our customers we not only find it necessary to supply them what they want when they want it and where they want it on a competitive basis, but we have to do more

13732 than express to them a desire to protect their interests. We have to show that we have the ability to prevent intrusion into their local territory of our products from other dealers outside of their territory. If we didn't do that we would lose their good will and lose their business, and it is essential for us, for the protection of our own business, to have that control as we have on all of our business with the dealers or with the contractors.

By Trial Examiner Norwood:

Q. Then, in substance, diversion will enable an outside dealer to undersell a dealer at a given point?

A. Not necessarily. It might not enable him to undersell, but will enable him to intrude himself upon the ter-

ritory,—poach on the preserves, as it were, of another dealer who perhaps had spent years and years to build up a trade on our brand.

By Mr. Leisure:

Q. And do you find it necessary, Mr. Sunderland, in your business to have a considerable number of dealers?

A. Oh, we couldn't—we might as well close up if we don't have our dealer trade, because with our Chanute mill the proportion of dealer trade to total has been declining because of the changing, ever-changing character of the business; but a large proportion, say over two-thirds of our business from the Chanute plant, is done with the dealer.

13733 Q. Yes. Now, following up further the Examiner's question as to the outside dealer, whether he sold at the same price or a lower price than the other dealers, what is your experience as to whether or not he would be able to give the customers the same service as the regular established dealer?

A. Well, Mr. Examiner, it is perfectly obvious that a man at some distance from the local market of a dealer cannot give as good service as a man who is located proximately at the place, the demand for the cement, with his facilities for storing and handling and transporting it to the customer. It is perfectly obvious that the dealer that we undertake to protect can give the best service.

By Mr. Leisure:

Q. Well, will you tell the Examiner whether or not it is essential to the good will of your product to have
13734 dealers who give proper and good service?

A. I think I have already stated that, but, of course—I will state it again, that it is absolutely essential that we have the good will of the dealer, and we can't have the good will of the dealer by just saying we desire to protect him; if we can't protect him he doesn't buy from us.

Q. When you were discussing the basing point price with Mr. Wooden on Friday you said you considered the term a misnomer. Will you look at Exhibit 2416-A and B, which is your letter of August, 1930 to the Federal Trade Commission? Will you look at it and tell us whether or not as far back as 1930 you were expressing those same views to the Federal Trade Commission?

A. I know I did. I don't know whether I said it in this letter.

Q. Well, if you know you did and—

A. (Interrupting) It is expressed in the next to the last paragraph in this letter, which says in general "I might add"—

Q. (Interrupting) Very good. The exhibit is in evidence. We don't need to read it.

A. Yes.

Q. Now, Mr. Sunderland, on Friday you used the phrase "price reduction" and you also used the phrase "price cutting". Do you distinguish in any way between
13735 those two phrases or those two terms?

A. Oh, yes.

Q. Will you explain?

A. We, for instance, Ash Grove Company, might at any time, so far as our territory is concerned—I mean insofar as concerns the territory, where our maximum net plus our freight rates made the lowest price, it is conceivable that we might feel like reducing the price so far as we could, in which event we would simply send out quotations based on a lower maximum net.

Now, that is quite different from what I had in mind as cutting prices; a cut price being a price made under the published, known current market for the sake of deriving some temporary advantage, getting an order.

Q. Now, I notice in looking at the record you used "price reduction" and "price cutting" and in other places you used "chiseling". Will you explain that term also?

A. Well, I think in my conception of the term chiseler, the first time I ever heard that word was in the President's speech in advocacy of the N.R.A. My conception that I gained at that time, and that has been a sustained conception is that it is broader than just the term price cutting. It might be any unfair effort to gain advantage over a competitor. It might be by giving some special terms; it might be by financing him. It might be any one of
13736 many things that people in trade sometimes resort to in order to gain an advantage unfairly over a competitor.

Q. Now, I think Mr. Wooden also referred on Friday, under the heading of advertising, to some alleged protest that companies should not advertise that their cement was better than others.

Did you ever stop advertising that your cement was, in your opinion, a very fine product?

A. No. Our policy has never been changed. Our advertising has never been changed; and I might add that I have supplied the chief counsel with the literature that he asked me to supply him last week, which shows that we have used that sort of advertising not only in 1930 and 1931 but on through the years, and only within two weeks have we sent out an ad where we claimed that our Ash Grove cement exceeded standard specifications.

Q. In other words, you followed a consistent advertising policy down to date?

A. Never have changed our policy at all.

Q. And when you said "chief counsel" and pointed to Mr. Wooden, so the record will show, you were talking about chief counsel for the Federal Trade Commission?

A. Yes.

13738 By Mr. Leisure:

Q. Now, on Friday, Mr. Sunderland, Mr. Wooden asked you whether or not you tried to quote the same price as your competitors.

Are there certain markets where your company sets the price?

A. Oh, yes.

Q. Have you ever initiated a price change?

A. Yes, we have initiated a price change in territory where we establish the maximum net, controlling in that territory.

Q. And in those markets, would it be fair or correct to say, as Mr. Wooden's question suggested, that you tried to quote the same price as your competitors?

A. No, we didn't, no, not at all. We quoted a price, and, of course, if our competitors got any business, they would have to meet it.

Q. In other words, they would have to try to quote your price if they could?

A. They would have to meet it or else not get any business.

13739 Q. On page 13696 of the record, Mr. Sunderland, you were asked the following questions and you made these answers:

"Question: You believe it would discredit your product if you sold it at just as good a quality but took less for it, do you?

"Answer: I believe it would be discredited in the minds of the buyers and our trade generally, yes, sir.

"Question: If you got a better quality and a lower price, or as good a quality and lower price?

"Answer: I think it would tend to discredit our claims of higher quality because why, if our claims were true, would we sell it for less than the market?"

And you also said on page 13694, Mr. Sunderland,
13740 in response to these two questions:

"Question: Does it mean that you endeavor to make your delivered prices the same as your competitors?

"Answer: We endeavor to meet."

Did you mean to say there: "We endeavor to meet it?"

The record stands: "We endeavor to meet."

A. We endeavor to meet our competition at the market place.

Q. Yes.

"Question: And by meeting them you mean making them the same?

"Answer: Well, we wouldn't want to discredit our products or be charged with being a chiseler by quoting a lower price."

Charged by whom? Will you explain that expression you used in that answer?

A. By the trade. We have a reputation of being a one-price institution, and it is a very sensitive matter. It is, as I said a little while ago, sales psychology, customer psychology, and we can't afford to do something that is obviously inconsistent with what we claim to do.

Q. And you mean by the trade, your purchasers?

A. I mean our customers.

Q. Yes.

A. And potential customers.

13741 Q. In Chicago, Mr. Sunderland, a Mr. Royal testified to the effect that he had seen you in Omaha, Nebraska. Did you ever see Mr. Royal in Omaha, Nebraska, in your life?

A. No, sir; I never saw him anywhere except in my office in Kansas City.

Q. Did you tell him, refusing to give the name of the mill, that another mill had set a base on your Superior mill?

A. Obviously not, no, I never told him that because we have no Superior mill.

Q. Mr. Wooden also asked you on Friday, coming back to the record, about an incident some eight years ago, when the Lehigh Company as Mr. Wooden's questions phrased it, imposed a base on your mill. And this morning Mr. Wooden asked you certain questions about your conversation with Mr. Bass.

There is one further question that he did not ask you which I would now like to ask you about that conversation. Did you tell him that you considered it a violation of the Anti-Trust Laws, this concerted action which Mr. Wooden pointed out?

A. Well, now, it would have been very natural for me to say that I thought any such act was in violation of the Anti-Trust Laws.

Q. But, as I understood you to say this morning, you did not make any statement that by agreement, as the
13742 phraseology was used in Mr. Bass' statement, which is on page 13398 of the record, Mr. Sunderland, in which Mr. Bass says that Mr. Sunderland told him—"Mr. Sunderland told me he considered it a violation of the Anti-Trust Laws," and further on, he said "He believed that the cement company was acting in concert with two or three other competitors".

You made no such statement as that?

A. I did not, and I could not have done so from any knowledge that I had, and I didn't think so, and I don't think so now.

Q. Now, with regard to this subject of f.o.b. mill prices, which Mr. Wooden discussed with you this morning, have you always been perfectly free to quote mill prices?

A. We have always been free.

Q. If you chose to do so?

A. To quote any prices any way we saw fit. We never have been committed to anybody or any competitor as to our marketing prices.

Q. Yes.

A. And we are free to change our maximum subject to the limitation of competition, because we have got to meet our competition or not get any business, but we have always been free, if we chose to do so, to lower our prices and in any territory where the maximum net to which we lowered them plus our freight rates would reduce them.

13743 Q. Now, in discussing the freight rate books and the freight rate expert which you have this morning, you made some statement about the accuracy of the freight rate books.

Do you know of your own knowledge as to how frequent errors are or are not found in the freight rate books?

A. Oh, well, with a book that records or that compiles thousands of rates—

Q. Do you know of any instance—let me make it shorter.

A. What?

Q. Let me make it shorter. Do you know of any instance—

A. Well, now, I can't name them.

Q. —where errors have been found?

A. No, no, sir, not at this time.

Redirect Examination by Mr. Wooden.

Q. Mr. Sunderland, you say you meet the competition at destinations depending on the information that you obtain as to what competitors are quoting at the same destination?

A. No. It is generally through a competitor's quotation that we pick up in the field.

Q. Well, that is a detail. I was merely asking you if that is how you got the information that you based
13744 your quotations upon, the information that you got as to what competitors were quoting at given destinations.

A. In that manner, yes. I didn't intend that—didn't intend at all to evade your question, Mr. Wooden.

Q. How do you do it when you quote on sealed bids? How do you know what competitors are quoting on sealed bids?

A. Just the same as we quote on unsealed bids.

Q. In other words—

A. When we send out our general quotations, we base them on the same general information that we do when we send sealed bids in.

Q. Do you expect your competitors to quote the same on sealed bids that they do—

A. Well, we hope they will. We hope they won't cut the market and be chiselers, but we have no control over that.

Q. You referred to or defined price cutting as cutting to gain some temporary advantage or to get an order, a particular order.

A. That is sometimes done.

Q. You think it is unfair to cut prices to gain a temporary advantage?

A. I think it is chiseling.

Q. Now, as to your answer to Mr. Leisure on the local dealers giving better service than dealers from the outside, why aren't you willing to let the customers of the
13745 local dealer decide whether he is giving better service than an outside dealer?

A. Well, Mr. Wooden, we are interested in the good will and business of the local dealer, and we are interested in the integrity of that business and retention of his good will and business that goes with it. We are not interested in the other phase of it, but he asked me whether I knew as a fact what the fact was, and I told him what the fact is, and I know that is true from my long experience and observation.

Q. Aren't you interested in whether the customer is satisfied with the local dealer's service or wants to buy from an outside dealer?

A. Well, our customer is the dealer, Mr. Wooden.

Q. Pardon?

A. Our customer is the dealer.

Q. You are not concerned about the dealer's customers?

A. Well, of course, we can't concern ourselves about everybody's business, but we are interested in what we do or fail to do that affects the interests of our customer.

Q. You are not interested in the ultimate consumer?

A. Oh, yes, we are.

13747 Q. If you are interested in the ultimate consumer why not let him decide whether he wants to buy from the local dealer or from some other dealer outside.

A. We do, so far as that is concerned, except as our policy may preclude his buying or material.

Q. And diverting it?

A. At the point where it is an intrusion, which will cause us to lose the good will and the business of our local dealer who has built up the demand for our products.

Q. Both dealers might be building up the demand, might they not, the one who diverts it—

A. Well, as a practcal matter, no.

Q. The one who dverts it, doesn't built up a demand?
A. He is tearing down.
Q. I see. Isn't the poaching on the territory of other dealers usually done at lower prices than the local dealer is charging?
A. Well, I can't answer that. It is my judgment that it is sometimes and sometimes it is not.
Q. Well, on your general experience, isn't the local dealer with his superior service that you refer to—doesn't he have an inside edge on local business except when an outside dealer cuts the price on it?
A. Well, I would say no, because he has all the
13748 competition there is in he cement business. There are many brands besides the Ash Grove brands, and those he must compete with. He also must compete with other materials. And in respect to my interest in the consumer, I said, yes, I am interested in the consumer, and I am most proud to be actively connected with an industry whose product is the lowest cost, lowest price to the public of any fabricated product in the world.
13749 Q. Well, you look upon competition among dealers on the sale of cement in the same way that you do competition among manufacturers on the sale of it, that the dealers should have the same price in their respective localities?
A. I don't know what you mean by that question.
13750 I am not concerned with the prices per se that the dealers make to their customers. We never, as a matter of policy, have interested ourselves in nor concerned ourselves with the dealer's local affairs. We never interefered with them, we never asked them to take a small margin or to get a large margin. We don't interfere with the dealer's prices to their customers or their terms or conditions of sale or any of their trading relations with their customers in any way, shape or form.
13751 Q. I show you a paper marked 2436 for identification. What is that, Mr. Sunderland?
A. That is an insert that my company recently sent out with a letter to customers who had favored us with some business this last year.
Q. Dealers you mean?
A. Dealers.
Q. How recently was it sent out?
A. Oh, within two or three weeks.

Q. Is that the first issue of that sort of advertising during the year 1938?

13752 A. Well, this is the first issue of this insert.

Q. Is it the first issue of the reference to your cement being far above specification requirements?

A. I can't say that it is, because we are sending out literature constantly and when we get out a piece of literature, sometimes it lasts for several years. There has been no time when we have not constantly advertised quality products and endeavored to produce quality products to sustain our advertising. We never slacked our efforts nor changed our policy.

Q. Did you bring in all the samples of advertising in which such claims were made over a period of years?

A. Well, I don't know whether—I can't answer that. You said you didn't want, as I remember, the advertising that was on certain products like Quick Hard.

Q. That is right.

A. Now, whether or not we have included everything—but, I have endeavored to give you what I thought you wanted, and it extends from about 1930 down to the present time.

Q. That is right.

A. Now, whether or not we have included everything—but, I have endeavored to give you what I thought you wanted, and it extends from about 1930 down to the present time.

Q. Have you indulged in consumer demand—I mean consumer advertising in which you stated that your standard cement was far above specification requirements?

Mr. Leisure: We went over that Friday. That is the same subject and we had the same questions and answers.

13753 Trial Examiner Norwood: I think so. This is redirect.

Mr. Wooden: But he has brought in what purports to be the samples of the advertising and I want to find out whether it is consumer advertising that he is talking about or dealer advertising.

Trial Examiner Norwood: Go ahead.

A. I supposed you were talking about the advertising of the Ash Grove Lime & Portland Cement Company to its customers. We don't have any consumer customers, speaking in terms of the dealers' customers.

By Mr. Wooden:

Q. Do you still advertise to the contracting trade that your cement is far above specifications?

A. Well, whether we have sent out any literature directed to the contracting trade along that same line I can't say.

Q. Do you advertise to such effect in any contractors' journals?

A. Well now, I can't answer that.

Q. Did you formerly do so?

A. I can't answer that. I rather think we have. I can't think of any particular ad. Our policy has never been changed. It didn't make any difference whether it was a consumer or whether it was a contractor customer or dealer customer. That is our attitude with respect to our products.

13754 Q. Will you produce any advertising to the contractor trade or in contractors' and builders' journals in which you stated that your standard cement was above standard specifications?

A. I will if we have them.

Q. All right.

A. Delighted.

Q. All right. I will confine that request, Mr. Sunderland, to anything since 1935.

A. Since 1935?

Q. Yes. That is all.

13757 Regarding the proffer some time ago of the following exhibits, for identification: Commission's 2237, 2238, 2239, 2240, 2241, 2242, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2252, 2253-A and B, and 2257, the objections are overruled and they are received as marked.

(COM. EX. 2237, 2238, 2239, 2240, 2241, 2242, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2252, 2253-A and B, and 2257 were offered and received in evidence.)

13758 (COM. EX. 2379-A and B was offered and received in evidence.)

13759 (COM. EX. 2260 was offered and received in evidence.)

13759 F. V. REAGEL, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am engineer of materials for the Missouri State
13760 Highway Department and have been connected there since the fall of 1922. My duties are the supervision and inspection of materials and research and supervision of purchase of certain types of materials including the purchase of cement to the extent that we now purchase. I have been connected with the purchase of cement since 1923 or 1924. In the purchase of cement we have compiled the needs or obtained those needs from our plans departments and then proceeded to issue invitations for bids, received those bids and let contracts under the bids.

Q. What, in general, has been the methods employed in the purchase of cement by your department?

A. Well, during the period at which, or, during which we could get Federal aid and furnish cement to our contractors, which, I believe, ended in 1933, we had formal lettings anticipating, insofar as possible, our needs for a year, and invited all interested cement companies to
13761 bid on those requirements and then distributing those to contractors as needed for the various jobs.

Beginning about 1933, due to a ruling of the Federal Bureau we could no longer obtain Federal aid and furnish cement to our contractors, so that the bulk of that cement, or all of the contractor used cement then was purchased by contractors.

Following that date we continued to purchase cement for our maintenance requirements, but since that is only random shipments in relatively small quantities we no longer have formal lettings or formal contracts but purchase on a quotation basis.

13762 Q. You haven't had that since 1933?

A. I think that is approximately the date.

Q. What was the Federal Bureau that made that ruling that you could not get Federal aid unless the contractors bought the cement?

A. The Bureau of Public Roads, Department of Agriculture.

Q. Will you give us some idea of what the quantity of the Missouri Highway requirements for maintenance purposes is?

A. Oh, I would say, I think last year it ran between six and seven thousand barrels. I would say that for two or three years previous to that, it would be in the neighborhood of 10,000 for the entire year.

Q. During the same years, what would you say the cement purchased by contractors for Missouri roads would amount to?

A. The only way I could estimate that is by the last year in which we purchased and furnished to contractors, and that year was somewhat over 900,000 barrels, which was considerably less than, however, previous years preceding that. The maximum would be—would approach 2,000,000 per year.

Q. The 900,000 barrels, would that be for 1934, would you say?

A. That would be my recollection of the figure the last year that we furnished to contractors.

Q. Give us an idea of how large your requirements were, your purchases were during the years that you
13763 bought direct from the mills.

A. For supplying contractors?

Q. Yes.

A. Well, I would say it would vary from 1,900,000 barrels, probably being lowered here for the following four years to the low figure of 900,000 plus, and I would say that the second year would be about 1,600,000.

Q. You mean by the second year, the second in size?

A. Yes, sir. Our program was being reduced during that period and that accounts for the difference.

Q. When you bought direct from the mills to supply contractors, were you under any requirements of law or regulation as to how you awarded the contracts in those cases?

A. I believe not. Early in the history of our purchases —I can explain that answer by saying that at the present there is a state statute which, according to my understanding, requires us to state in our request for bids that a certain wording—that a certain wording be placed in our invitation for bids. That wording is to the effect that preference shall be given to materials made, grown, or manufactured within the State of Missouri.

My understanding, however, is that there is nothing in the statute to make you comply with that, but simply requires you to place that wording in the invitation.

Q. Were you under any requirement of law or
13764 regulation as to how you would make the awards other than that you just mentioned?

A. I believe not.

Q. Were you at liberty, as you understood it, to make the award to the highest bidder?

A. No, I don't believe that there was any law in that connection, but certainly a matter of public policy. We would not and did not.

Q. Was there any policy followed with regard to awarding a contract to the lowest bidder?

A. Yes, I would say so.

Q. Was that the general policy?

A. Yes, sir.

Q. Was that the policy based on the statute requirements, or how?

A. I can't answer except to say that I know of no statute that required that, but certainly it was our policy to attempt to get the most economical materials that we could.

Q. Did your department ever follow the policy of making awards by lot?

A. Not to my recollection in connection with our purchases of cement, unless it might have happened rather recently during—rather, during the code period, or, rather, recently in connection with these quotations. There was no such action taken in connection with contracts,
13765 these formal contracts. I don't recall of any in connection with quotations.

13766. The witness identified Com. Ex. 2437, 2438, 2439, 2440, 2441, 2442 as prints of official tabulations of bids received, formal lettings of cement requirements for the years noted. Com. Ex. 2437 relates to bids received March 5, 1929.

Examination by Examiner Norwood.

It is a tabulation.

Com. Ex. 2438 is the same for the year 1930; bids received December 19, 1929. Com. Ex. 2439 is for the year 1931, bids received January 20, 1931. Com. Ex. 2440 is the

second letting for the same year, March 5, 1931. Com. Ex.
2441, bids received October 10, 1931 for the year
13767 1932. Com. Ex. 2442 is for bids received November
7, 1932 for the year 1933. These papers are duplicates of the official abstracts made at the time of the reception of the bids.

Q. Have you brought also the bids, original bids from which these duplicate abstracts were made?

A. Yes. There is a file for each company containing the invitation, proposal and contract for that company.

Q. Was the same form of invitation sent to each bidder?

A. Yes.

Mr. Zimmerman: Off the record.

Trial Examiner Norwood: Off the record?

Mr. Zimmerman: Yes.

Trial Examiner Norwood: Off the record.

(A discussion ensued off the record.)

By Mr. Wooden:

Q. I meant the same form being sent to each bidder for each particular letting.

A. That is right.

(The folder referred to was marked "Commission's Exhibit 2443" for identification.)

By Mr. Wooden:

13768 The witness identified Com. Ex. 2443 as a folder containing the invitation proposals and contracts with the Lehigh Portland Cement Company for the years 1929, 1930, 1931, 1932 and 1933.

Mr. Wooden: Your Honor, at this time I wish to offer the papers marked for identification and identified by the witness as 2437 to 2442, inclusive, being the duplicates of official abstracts and—off the record a moment.

(A discussion ensued off the record.)

Mr. Wooden: At the same time, Your Honor, I would offer 2443 as containing samples of the invitations extended to each of the bidders for the lettings of the years named in the abstracts.

I also—just a moment.

The original bids and the original contracts
13769 were in the folder. The contract would not in all cases cover all of the bids because the business was distributed among the companies but the original bid is

within the folder upon each point bid upon. The bids were contained in each of the company's files. The invitation and proposal and contracts were all bound together. All of the papers were the bids which were represented in the abstract, and what he termed a proposal is a bid.

13770 Mr. Leisure: (Interrupting) The important thing is whether or not anybody got contracts, which are not shown in this book. In other words, other than Lehigh.

Mr. Wooden: I assumed they were. I am not concerned with showing who got the contracts. What I am concerned with is the nature of the bids and I proffer, in connection with the offer, the original bids for checking purposes against the abstracts; and I assume and understand that the witness expects those original documents to be returned after the checking has taken place but that he does not care for the return of the abstracts themselves. They are duplicate copies.

By Mr. Wooden:

Q. Is that right, Mr. Reagel?

A. That is right.

Mr. Leisure: Your Honor, without taking time to go through these now, if we have the opportunity to check them, I will not make any objection at this present time, subject to check. If we find that basic material is missing so that we cannot check these abstracts in some way, we may have to make objections at that time.

13772 There was one proposal missing and that fact is noted on a sheet. One of the abstracts was missing. There was one company, the Missouri Portland Cement Company, represented in one of the lettings that was not on the tabulation and they did not have that; it had been lost some place.

Trial Examiner Norwood: Subject to the conditions named, the exhibits are received as marked, 2437 to 2442, inclusive.

(COM. EX. 2437, 2438, 2439, 2440, 2441 and 2442 were offered and received in evidence.)

By Mr. Wooden:

13773 Q. Do I understand, Mr. Reagel, that you have checked these papers before bringing them here, and with the exception as to the Missouri that you just named, that all of the bids are here?

13774 (COM. EX. 2443-A to N, 2444-A to N, 2445-A to P, 2446-A to O, 2447-A to O, 2448-A to P and 2449-A to N were offered and received in evidence.)

13780 Mr. Zimmerman: Now, with the understanding that there may be offered in connection with these tabulations whatever material is found in the several files which contain the bids and correspondence with the several bidders and the State Highway Department of Missouri relating to the bids referred to in these tabulations, I think I should say that I would not make any objection to the tabulations, but I think we should preserve that right to make those as complete and show as complete a picture as the abstracts heretofore furnished by the Government of the United States.

Trial Examiner Norwood: Is that agreeable?

Mr. Wooden: That is agreeable with this statement, that if it be shown regarding any particular company, we reserve the right to show it as to all companies the same.

13781 Mr. Zimmerman: Oh, quite so. Yes, I think that is quite all right.

13782 The witness identified Com. Ex. 2450 as a file in date order beginning January 16, 1934, in which is contained tabulations of quotations in response to the requests of the Missouri Highway Department for the random shipments for maintenance work following the years in which "we" let formal contracts.

13783 Q. Do you have here the original bids from which the data in the folder marked 2450 for identification appears?

A. I do.

Q. Do you wish all this material returned to you?

A. Yes sir.

Q. 2450 and the bids from which 2450 is compiled?

A. If possible, yes, sir.

Mr. Wooden: Your Honor, I am not offering at this time 2450 or any of the supporting data which the witness says is here. I reserve the right, however, to have a tabulation made of the material that appears in 2450 and subject to check against the original material, then to offer that tabulation in evidence later.

Mr. Leisure: Are you adopting my suggestion or some other suggestion, Mr. Wooden?

Mr. Wooden: I thought it was agreeable.

13784 Mr. Leisure: That the witness compile this and forward it with the basic data?

Mr. Wooden: Well, no. My suggestion was really that we retain this material until we have an opportunity to make a tabulation and then return it after the tabulation is made and after you have had a chance to check the tabulation we make with the original material.

Mr. Leisure: That is all right.

Mr. McFadden: Our suggestion was that we have objected heretofore to the type of tabulation made by Mr. White, and they are admitted despite our objection. We thought possibly Mr. Reagel could make one we wouldn't have to object to.

Mr. Wooden: I have no objection to the witness himself making such a tabulation, or having it made in his office. I don't like to put that burden on him, that is all.

13786 *Cross-Examination by Mr. Leisure.*

13788 Q. Now, as regards to the first letting, were any contracts made with respect to that?

A. My recollection of the situation was that there were none let; no contracts awarded on the basis of the bids of January 20, 1931.

13790 Q. To save time, Mr. Reagel, don't you find that Lone Star and Marquette are the two low bidders on that bid of January, 1931?

A. I find that Lone Star to have a number of points in which they are lower than other bidders.

Q. Yes. Now, look at Marquette. Don't you also find that they were low at some points?

A. Yes.

Q. Yes. Now, will you tell us why since it was your policy to award to the lowest bidders, as you have told us—can you suggest to the Examiner why in this instance the bids were not given to Lone Star and Marquette when they were lowest? Why the contracts were not given to them?

A. Yes, I will tell you why no contracts were given on the basis of that, because it was our judgment that prices would be still lower, and so we reserved—so we used the

right which we always reserve to reject any or all bids and took new bids with the expectation or hope that we would get still lower prices.

By Mr. Zimmerman:

Q. On that same point, please, what reason had
13791 you to believe that prices would be still lower?

A. I don't know whether I can answer that and be certain of it or not.

Q. Well, for the purposes of refreshing your recollection, just tell us again the date involved.

A. January 20th and March 5th.

Q. The year?

A. 1931.

Q. Now, is it not a fact, and this may refresh your recollection, that there had been prior to those dates a number of drops in price in many commodities that the state was purchasing? There was a period of falling prices in market?

A. I couldn't—I couldn't answer. I think that is the case.

Q. That is your best recollection of it, at any rate?

A. Yes.

Q. You can recall that some things began to happen along—

A. Along about that time.

Q. —along about the fall of 1929, and they continued to go along, prices dropping and dropping for some period of time after that?

A. That is true.

Q. So that the period became commonly described as a depression period; right?

13792 A. That is right, yes, sir.

Q. Now, the advertisement and the specifications and proposals for furnishing cement and general conditions, all of those items which I have mentioned being a part of the titles of papers which you sent out in soliciting bids, contain generally terms which would become a part of any contract that you entered into with any successful bidder?

I hand you this booklet containing some of those specifications and general conditions so that you may see what I am talking about.

Mr. Zimmerman: Now, you had better read the question.

(Question read.)

A. Yes.

By Mr. Zimmerman:

Q. The terms and conditions set forth in those papers formed a part of what we refer to as the invitation to bid, is that right?

A. Yes, sir.

Q. And any bid would be made based upon and including all of those provisions?

A. That is correct.

Q. Now, all of those provisions and conditions were the result of accumulated knowledge and experience of your department over a period of a good many
13793 years' time; is that not so?

A. That is correct.

Q. And you considered them from every viewpoint the best and wisest conditions and terms under which it was proper for the state to make purchases of cement based upon your experience?

A. I would think so.

H. B. HENDERLITE, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

13794 I am Chief Engineer for the Louisiana Highway Commission and have held that position practically about nine years. In that position I have performed hardly any duties with reference to the purchase of cement. Cement is not purchased by the engineers but by the purchasing agents of the Commission. During that period, with regard to the taking of bids on cement purchases, the specifications were prepared and advertisements run and bids received under my supervision. When the bids were received, I did not have anything further to do with it. The bids were not tabulated or abstracted in my office. On the first of the bids, that was in 1929, there were no copies made. When the bids were read, the proposals were merely turned over to the purchasing agent of the

Commission. In 1931 I think the same procedure was followed and in 1935 only two groups of bids were received at that time. The bids were tabulated in
13795 public just as the construction contracts were. In my official capacity I had access to all the bids received on cement and to any tabulations made in my department.

Q. Will you tell us in a general way just how the State of Louisiana has gone about the purchase of cement.

A. Well, the cement is purchased in the same way as bids are taken on construction work; that is, it is advertised, the proposal prepared, and bids are called for in an advertisement that runs 30 days. Then they are received, and with the difference that I have explained, the difference in the years.

13796 Q. Well, what difference has there been between the years?

A. In 1929 the opening and reading of the bids was very informal. The same thing in 1931.

Q. And then 1935; what about that?

A. 1935 they were opened and read in the same manner as the construction contract bids were.

Q. What has been the policy with regard to the making of awards of bids for the cement requirements of the Louisiana Highway Commission?

A. There didn't seem to be any policy.

Q. Were you acting under any requirement of law or regulation in the taking of bids?

A. No, sir. It isn't required in the statute, the permission to purchase materials in competition.

Q. Can you say what the purpose was in having bids submitted by different bidders?

A. The theory was it was cheaper.

Q. Cheaper in what way?

A. You would get lower prices. That was the theory.

Q. You mean that the theory was that that would be competitive bidding, or what?

A. That was the idea, yes, sir.

Q. Give us some idea of the quantities purchased by the Louisiana Highway Department.

A. In 1929 something over 2,000,000.

13797 Q. Barrels?

A. And in 1931 the bids called for about 8,000,000, and in 1935 about 300,000 barrels.

Q. Has the State of Louisiana bought cement direct since 1935?

A. No, sir. The contractors buy their own cement.

Q. Can you say why that method of purchasing has superseded the other method?

A. Well, I don't know of any particular reason except they just stopped it. It was unpopular with the contractors.

Q. You mentioned 1931 and then 1935 as the next. How was cement purchased in between 1931 and 1935?

A. The cement purchased in 1931, 8,000,000 barrels, we didn't need to purchase any more.

Q. Until 1935?

A. Yes.

Q. Has the State been buying cement direct for maintenance purposes since 1935?

A. Yes, sir.

Q. Give us some idea of the maintenance requirements. What do the maintenance requirements amount to?

A. Oh, very small.

Q. Well, give us some idea.

A. Just for patching. I really couldn't tell you. Not over a few thousand barrels at the most.

13798 Q. Well, what is a few thousand?

A. Just purchased on the open market.

Q. What is a few thousand?

A. Well, I really don't know; to tell you the truth. I am just guessing now.

Q. Is it as much as 100,000?

A. Oh, no.

Q. As much as 50,000?

A. Oh, no. It would not be as much as 5,000.

The witness identified Com. Ex. 2451, as a photographic copy of the tabulation of all the prices from all the proposals, bids received in 1929. The witness couldn't tell counsel when that was made up, but he is pretty sure they were merely copied from the proposals after the bids were received and opened; probably within a week or

13799 two. He doesn't believe that the date on which this opening occurred is on here. If counsel will give him one of the proposals he can give counsel that date. This doesn't contain the date at all. The date was August 19, 1929, when the bids were received.

(The papers referred to were marked as "Commis-

sion's Exhibits 2452-A, 2452-B and 2452-C" for identification.)

Mr. Zimmerman: Excuse my interruption. Are you going to offer 2451?

Mr. Wooden: Yes.

Mr. Zimmerman: Don't you want to do it one at a time so that we can make our objections to them?

Mr. Wooden: There are only three or four and I thought I would offer them all at once.

Mr. Zimmerman: All right.

13800 Mr. Wooden: I think your objections will probably be the same to each.

Mr. Zimmerman: It might save a little time.

Mr. Wooden: That is what I thought I was doing.

The witness identified Com. Ex. 2452 A, B and C as tabulations of all the bids received from all of the companies submitting bids on January 19, 1931. The witness also brought the original bids from which this tabulation was made; Com. Ex. 2453 as a tabulation of the bids received from all of the cement companies submitting bids

13801 on June 14, 1935; Com. Ex. 2454 A and B as a tabulation of the bids received from all of the companies submitting bids on January 18, 1935. The witness brought the original bids from which that tabulation was made.

13802 Mr. Wooden: Your Honor, I will offer at this time the tabulations which the witness has identified as No. 2451, 2452-A, B, C, 2453, 2454-A and B, and proffer the original bids from which the tabulations were made for checking purposes.

13805 *Examination on Voir Dire by Mr. Leisure.*

Q. I notice under Exhibit 2451 you have two columns. One is called "bid" and the other is "contract." And under "contract" you have "price" and "amount."

Will you explain that, please? I mean, just ex-

13806 plain what it means. How is it used?

A. I will tell you what I think it means. This tabulation was made after the contracts were awarded and completed, and this is merely a record of the bid received and the contracts as written. There were some negotiations in one of these bids, and the price was reduced. I

think that explains the difference, you see, and it appears to be 15 cents.

13807 Q. Would you explain further on this same exhibit that we referred to a moment ago, 2451,—there appears to be a bid of $2.41 and the contract was let at $2.46. How would that be possible?

A. I don't know. I have no explanation for it.

Q. You notice that follows that—

A. (Interrupting) I see that is correct, but I have no explanation for it.

Mr. Wooden: Is that just that one point, or does that same thing run all the way through?

Mr. Leisure: All the way through.

Mr. Wooden: Off the record.

13809 Mr. Wooden: Your Honor, pursuant to the practice followed hitherto, I am offering at this time forms of invitation covering each of the lettings that the witness has referred to; under 2455-A to L, inclusive, the proposal of the Lehigh Company for approximately 36,000 barrels of standard cement for the letting of June 14, 1935; 2456-A to P, inclusive, the proposal of the Lehigh for approximately 238,000 barrels for the letting of January 18, 1935; the proposal of the Marquette Portland Cement Company for 8,500,000 barrels for the letting of January 19, 1931,—2457-A to V, inclusive, the Marquette proposal; and 2458-A to L, inclusive, the Trinity proposal for the letting of August 19, 1929.

I take it, there is no point in having the witness indulge in any formal identification of these papers. He has produced them here and everybody understands that.

Trial Examiner Norwood: Are they the documents described there, Mr. Witness?

The Witness: I beg your pardon?

By Mr. Wooden:

Q. Are these among the documents which you produced here today?

A. Yes, sir.

13810 Q. State whether or not the same form of invitation was extended to each prospective bidder?

A. Yes, sir. There may be a variation between the different lettings.

Q. Yes.

A. That is, the form for one letting may be different from another, but for each letting they are uniform.

Q. That is right. Are all the terms of the invitation embodied in the proposals of the various bidders?

A. Yes, sir.

Q. I notice that the Marquette on the outside is specified as "contract", while inside it is "proposal." Which is it?

A. That is just a cover they used, the old contract cover.

Q. It is a proposal, is it?

A. Yes.

Q. Is that right?

A Yes, sir.

Q. Do you want these proposals returned to you?

A. I beg your pardon?

Q. Do you want these proposals returned to you?

A. No, sir; you can keep those.

Q. The only thing you want returned, then, I take it, are the bids—well, tell us what you want returned, now, just to be sure.

A. Just return what you don't need, and we will 13811 let it go at that.

Q. All right.

A. We have no further use.

Mr. Wooden: I think I have nothing further to ask.

Trial Examiner Norwood: Any objection to the last proffer?

Mr. Leisure: If the underlying data are here, we would make no objection to the tabulations as such. However, if we find that there is underlying data which is in any way, in our opinion, in conflict with the tabulations or which should be offered in evidence, I assume it will not be necessary to have the witness here as far as identification goes, at least.

Trial Examiner Norwood: I think that is agreed.

Mr. Wooden: We will meet every reasonable requirement regarding such matter.

(COM. EX. 2451, 2452-A, B, C, 2453, 2454-A and B, 2455-A to L, 2456-A to P, 2457-A to V, and 2458-A to L were offered and received in evidence.)

13812 *Cross-Examination by Mr. Zimmerman.*

13813 Q. You say there was no set policy as to how the contracts and the prices in the contracts would be made?

A. No, sir. Their proposals, I am pretty sure, provide that the Commission can award at the price bid or negotiate for a further price.

Q. So that there was no set policy that the Commission would follow and conform exactly to the proposal or 13814 the bid price in making an award?

A. No, sir.

Q. Who was it that made up these proposal forms with the terms and conditions in them?

A. The attorneys,—the Commission's attorneys made those up with the exception of the technical specifications.

Q. Yes. Those the engineers made up?

A. Yes, sir.

Q. But as to the terms and conditions of the specifications, the general conditions, those were made up by the attorney?

A. Yes, sir.

Q. Did you have before you the forms that were used in other states, such, for example, as the State of Missouri?

A. I believe we followed the Illinois form.

Q. Yes.

A. And the North Carolina form.

Q. Well, I notice that these are in substance the same as Missouri.

A. Well, they were pretty much all the same at that time, I think. I don't recall the Missouri form, but I remember the Illinois form.

We did get some of those, and this policy for the 13815 purchase of cement was followed in Louisiana because it had been used in North Carolina.

Q. When were such forms of general conditions first made up in Louisiana?

A. Why, I don't know how long before those bids were received, but it couldn't have been very long—several months, possibly.

Q. Well, now, of course, you go back here to 1929.

A. 1929. It was sometime in 1929.

Q. And you used substantially the same forms and specifications for a good many years, didn't you?

A. You mean—

Q. (Interrupting) So far as the general conditions were concerned.

A. Well, those general conditions are probably copied from the construction contracts.

Q. Yes. Well, how long had you followed those same conditions, as far as you know?

A. Well, if they are a copy from the construction contracts that would be since 1921.

Q. Yes. Now, for example, I notice on page 3 of this Commission's Exhibit 2457, I believe that is marked,—that page is marked 2457-O,—I find a clause here entitled in caps "SHIPMENTS". It reads "Any shipments made on an agreement entered unto under this quotation
13816 will be at the price at which the seller then offers to make current sales of Portland cement at destinations mentioned in the quotation of such current price is below the price herein mentioned".

A. It should be "if".

Q. The word "unto" should be "into", shouldn't it?

A. "into", yes, sir.

Q. And the word "of", where it says "mentioned in the quotation of such current price" should be "if"?

A. That is correct.

Q. Then it follows "but under no condition during the existence of this contract shall the Commission have to pay more for cement herein provided for than in accordance with the attached scheduled prices and as herein stipulated".

That provision is substantially the same provision that had been used for many years prior to 1929?

A. This was copied from some other State, yes.

Q. Yes. And the provisions which called for the selling of cement or bidding on cement at f.o.b. destination prices had been used for many years prior to 1929 too, had it not?

A. I don't know that. I don't know whether it was an innovation in Louisiana or not.

Q. But that was uniform in Louisiana during all your experience?

A. Yes, sir, it was.

13817 Q. Take this Provision 6 in the general conditions: "When cement is required to be shipped to a point or points other than the delivery points herein mentioned the price of the cement so shipped shall be

calculated by subtracting the freight to the point originally bid upon and substituting therefor the freight to the new destination".

How old was that clause, if you know?

A. I am pretty certain that was copied from the specifications of other States. I have no idea.

Q. Has it always been followed substantially in all your experience with the Highway Commission in Louisiana?

A. Yes, sir.

Q. And as to No. 8 on page 2 of the general conditions, which is marked 2457-D, has that provision been standard in Louisiana during all your experience?

A. Yes, sir.

Q. I note here Provision II on the same page, "The successful bidder shall be responsible for any damage to the cement during transit".

How about that one? Is that an old form; one that has been followed all during your period down there?

A. Yes, sir.

13823 Kansas City, Missouri,
January 17, 1939.

13825 Mr. Wooden: Before calling the first witness, I would like to inquire whether counsel for respondents have reached a conclusion about the matter of stipulating the identification of certain Texas papers.

13826 Mr. Leisure: If the Examiner pleases, with respect to these exhibits which Mr. Wooden referred to a moment ago, starting with the series 2418 through 2435, as to the identification of those documents, 2418, 2419, and 2420, on the letterhead of non-respondents, I have no reason to doubt Mr. Wooden's statement that they came from Lone Star files, but I will have to check that, and I am willing to have that identification go subject to check. If we find that there is something incorrect about it, I ask permission to state to your Honor and have it go back de novo as of the present identification.

Mr. Wooden: Yes.

Mr. Leisure: I don't know whether they did or not, and I don't believe Mr. Wooden knows whether they did or not.

Mr. Wooden: I so understand.

Mr. Leisure: He is simply taking someone else's word that that is so.

Mr. Wooden: That is right.

13827 Mr. Leisure: The same is true of 2421. That also is from a non-respondent, and as to whether it came from Lone Star's files I ask permission to check that when we get back to New York.

Trial Examiner Norwood: What is that? 24 what?

Mr. Leisure: 2421. Your Honor will understand that these documents I am referring to, such as 2419, 2418 and 2421, are printed documents without signatures, that I have any way of identifying them.

Trial Examiner Norwood: Yes.

Mr. Leisure: As to 2417, it purports to bear the signature of one of the Respondents, so I raise no question as to the identification of that whatever.

The same is true as to the next one, 2423-A and B,—the same applies to that.

As to 2422, it appears to be a signature and is probably all right, but I ask permission to check that before I say that we waive all identification. It is apparently all right, however, because the initials are apparently by the same person who wrote some of the other exhibits.

As to 2424, I have no knowledge or information as to who the purported author of the printed signature is. He may be an employee of the Respondent. If he is I shall make no objection to that on the ground of

13828 identification.

Mr. MacIntyre: Off the record.

(A discussion ensued off the record.)

Mr. Leisure: As I say, I have no reason to question it but I have the duty of checking it before I waive identification.

As to 2425-A through 2425-O, it is also on the letterhead of a non-respondent, The Republic Portland Cement Company. As to whether it came from the files of Lone Star I ask permission to check that also.

2426 apparently has the signature of a respondent and I will make no objection to that as to identification.

As to 2427-A through E, there is a copy of the same document, I understand, in evidence. It is not on the letterhead of any company. As to whether it came from the files of Lone Star I have no information but I will ask permission to check that.

Now, 2428-A and B is an exhibit already in evidence so I do not assume counsel will want to offer it again, but I have no objection to identification of the document.

Mr. Wooden: There may be a number of these we do not care to offer.

Mr. Leisure: 2429 has the typewritten signature
13829 of one Louis R. Ferguson. I have no knowledge or information as to whether or not he is employed by one of the respondents, and ask permission to check that. If he is we will raise no objection as to identification.

Mr. MacIntyre: Your Honor please, Mr. Leisure, I believe you will find Mr. Louis R. Ferguson is a Vice-President of that corporation.

Mr. Leisure: It is signed, Your Honor, "Louis R. Ferguson, Vice-President".

Trial Examiner Norwood: Yes.

Mr. Leisure: It is not on any letterhead of Lone Star, however.

2430 has a typewritten signature. I also ask permission to check that. If he is employed by one of the Respondents we will not make any objection as to identification.

Mr. Wooden: Who is that?

Mr. Leisure: It is the typewritten signature of J. G. West, Traffic Department.

The same is true as to 2431.

As to 2432, it purports to bear the longhand
13830 signature of an employee of one of the respondents, so we make no objection as to the identification of that document.

May I ask Mr. Wooden a question off the record regarding this exhibit?

Trial Examiner Norwood: Off the record.

(A discussion ensued off the record.)

Mr. Leisure: 2433 is a typewritten memorandum without signature. It isn't clear exactly what file it may have come from. If it came from one of the files of the—do you know what file it came from, Mr. Wooden?

Mr. Wooden: Only by inference, and the inference is from the Trinity Portland Cement Company file.

13831 Mr. Leisure: All I can say at this time about the exhibits is that if by investigation we can find that it is a communication between any of the employees of the respondent companies, we will not make any objection to the identification.

13835 H. O. WARNER, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. MacIntyre.

I am sales manager of Colorado Portland Cement
13836 Company and have held that position continuously since 1919. I hold another position—the title of Vice-President of the company but it is just the duties of sales manager that I have. The only connection, position or association that I have in any way with the Ideal Cement Company is as an employee of the Colorado Portland Cement Company which is a part of the Ideal Cement Company.

The Colorado Portland Cement Company is the corporation reduced to a nominal capitalization charged with the duty of marketing the cement produced by the Colo-
13837 rado mills of the Ideal Cement Company. The Colorado Portland Cement Company is not owned in its entirety as an operating company by the Ideal Cement Company. It owns no property except perhaps a few desks or something of that kind. All of the mills, the product of which is sold by Colorado, are owned by the Ideal Cement Company. The Colorado Portland Cement Company is not an operating company using the assets of the Ideal Cement Company.

The Colorado Portland Cement Company was incorporated in the State of Colorado I imainge in 1899, but I am not sure. Its stock is held by the Ideal Cement Company. I have no title as an officer or employee of the Ideal Cement Company, or as an officer or employee of any subsidiary of the Ideal Cement Co. other than that of the Colorado Portland Cement Company, except in respect to our relations with the Bureau of Reclamation.
13838 The bids of the Union Portland Cement Company and the Three Forks Portland Cement Company have been handled by our office and signed by me with respect to the purchases of the Reclamation Department for probably 10 years, perhaps more. The relationship of the Union Portland Cement Company to the Ideal Cement Company I am quite sure is the same as that of the Colorado Portland Cement Company to the Ideal company. I

believe the Three Forks Portland Cement Company is separately incorporated and the Montana plants are owned by it, the Ideal Company owning most, but not all, of the stock of the Three Forks Portland Cement Company, constituting a controlling interest in the stock.

13841 By Mr. MacIntyre:

Q. Mr. Warner, you have mentioned your connection and your duties in the employment of the Union Portland Cement Company. Will you please state if you can, the location of the mill that produces cement
13842 for the Union Portland Cement Company?

A. Devils Slide, Utah.

Q. What is the territory within which that mill makes sales and shipments?

A. The entire State of Utah, the western part of Nevada —I should say the eastern part of Nevada, the western part of Wyoming and eastern Idaho.

13843 Q. Well, now, with respect to the reclamation projects, that is, sales for use on—sales of cement for use on reclamation projects by the Union Portland Cement Company over which you had supervision, just what territory and principally what projects have such sales included, going back for the period of this 10 years in picking out the principal ones?

A. Well, perhaps the American Falls dam in Idaho, the Boulder dam—the Hoover dam—in Nevada, the Pine River dam in Utah, the so-called Hiram dam in Utah, and there are probably others, but that is just a few of them that I think of now.

Q. Were the bids placed with respect to the Bonneville projects in Oregon?

A. We did not bid on Bonneville.

Q. What about the irrigation projects, the large irrigation projects in the State of Utah? Can you recall any of those?

A. Well, I think the Pine River dam and possibly the Hiram dam were identified with large irrigation projects, and there may have been others not identified by me.

Q. Do you recall the Caspar Alvova project?

A. That is in Wyoming. That was not bid by Union. It was bid by Colorado.

Q. You had supervision over the bid that you did place at the Colorado Portland Cement Company in that instance?

13844 A. Yes, sir, I signed that bid.

Q. Do you recall the irrigation flood control projects over which you had supervision of bids made by either Union or Colorado such as the Minnitoka dam?

A. I don't place the location of Minnitoka, Mr. MacIntyre.

Q. Deadwood dam? Do you recall it?

A. Can you tell me where it is located?

Q. Southwestern Wyoming, isn't it?

A. Well, I don't place it there, Mr. MacIntyre, but if it was within—anywhere within the State of Wyoming, I am pretty sure we bid on it.

Q. Well, we will pass that for a moment.

Will you state what the relationships, if any, of the companies by which you have been empoleyd, as you have testified, were with the Cement Institute?

A. I can only say with assurance with reference to the Colorado Portland Cement Company. I believe we have been members of the Institute since 1933.

Q. You don't recall any previous membership by the Colorado Cement Company in The Cement Institute?

A. No, sir.

Q. By the Ideal Cement Company?

A. I don't think so, but I wouldn't know about Ideal Cement Company, surely.

Q. You don't recall having attended any meet-
13845 ings of The Cement Institute with Mr. Charles Boettcher, the President of the Ideal Cement Company, previous to 1933?

A. No, sir.

Q. Do you know of your own knowledge whether or not Mr. Boettcher has been a trustee of The Cement Institute?

A. I believe he was trustee for our district.

Q. During what years?

A. I can't say certainly, Mr. MacIntyre, but I should say he was the only trustee that had ever acted for our district since they organized with trustees in the several districts.

Q. That would go back to 1930, wouldn't it, the organization of The Institute?

A. Well, it may, I can't say, but I am sure we only paid dues for Colorado since 1933.

13847 Q. Mr. Warner, I am showing you a document marked, for identification, as Commission's Exhibit

2254-A and B, and ask you to state whether or not you recognize the signature on this photostatic copy of a letter from the vice president of the Oklahoma Portland Cement Company to Mr. Charles Boettcher, President of the Oklahoma Cement Company?

A. It looks like Mr. Nichols' signature.

Q. Did you in your official capacity with the Colorado and the other companies of the Ideal group frequently see and handle correspondence from Mr. Nichols?

A. No, sir; I have correspondence with him only infrequently.

Q. But you have from time to time over the period of your employment from 1919 handled correspondence—

A. Yes, sir.

Q —that came into your office from him?

13848 A. Yes, sir, or I have seen some correspondence from him.

Q. Now, I show you a document marked, for identification, as Commission's Exhibit 2256-A and B, and ask you to state whether or not you recognize the signature appearing thereon as that of Mr. P. A. Thompson, Sales Manager of the Oklahoma Portland Cement Company.

A. Yes, sir; that looks like Mr. Thompson's signature.

Q. I now show you, Mr. Warner, a document which has been marked, for identification, as Commission's Exhibit 2251-A and B, and ask you to state whether or not you recognize that, and, if so, as what?

A. The signature or the letter?

Q. Well, acquaint yourself with the letter; that is, look at it to refresh your memory and recollection, such as you can refresh, of the letter itself, and let us know whether or not you recognize it.

Will you please state whether or not you recognize the signature on the letter as that of Mr. L. C. Newlands?

A. I am not familiar with Mr. Newlands' signature, and I can't say, but I have no reason to doubt it.

Q. Correspondence passed between your office and that of Mr. L. C. Newlands which has been called to your attention?

A. No, sir, I cannot think of any correspondence that I have had with Mr. Newlands.

Q. That is, you have no present recollection of correspondence?

13849 A. No, sir.

Q. Do you recognize the letter?

A. No, sir, I never saw that letter before.

Q. Do you recall correspondence that you had with Mr. H. L. Nappenberger, of the Oregon Portland Cement Company relative to the subject that is discussed in this letter here, that is 2251-A and B?

A. No, sir; I don't recall any correspondence with Mr. Nappenberger on that subject.

Q. I now call your attention again to Commission's Exhibit, for identification, 2251-A, and direct your attention to the second sentence, and ask you to state whether or not you know anything at all about the letter that Mr. Newlands states that he wrote to Mr. Morse, of your company on that subject.

A. The second sentence. The second sentence, Mr. MacIntyre?

13850 Q. What is Mr. Morse's full name, if you please, Mr. Warner?

A. Rubin J. Morse.

Q. What is his position with your company?

A. He is a Vice-President and General Manager of the Colorado Portland Cement Company.

Q. And what position does he hold with the Ideal Cement Company?

A. The same position.

13852 Q. Mr. Warner, will you please state whether or not Mr. R. J. Morse, an official of your company, handles or includes in his duties the handling of bids 13853 on reclamation projects in connection with your duties of submitting bids?

A. We often confer concerning the type of bid we want to put in, after which I put them in and sign them.

Q. That is, you mean you confer with Mr. Morse?

A. Yes, sir.

Q. Just what are his duties and functions in that connection other than his conferences with you, Mr. Warner?

A. Well, I don't believe that I can say what his duties are, Mr. MacIntyre. He is interested, as is Mr. Boettcher, and these matters are frequently discussed.

Q. What is his official capacity with the Ideal Company?

A. Mr. Morse?

Q. Yes.

A. Vice-President and General Manager.

Q. And do I understand you to say that he holds a similar position with the Colorado Portland Cement Company?
A. I should think so, yes, sir.
Q. Do you have in your organization, in your office in Denver, Colorado, a man by the name of Chris Dobbins?
A. Yes, sir.
Q. What is his position and duties with your company?
A. He is the Assistant Salesmanager of the Colorado Portland Cement Company.
Q. I take it, then, that he acts directly under your direction?
13854 A. Yes sir.
Q. Do you have a man in your organization, in your Denver office, by the name of E. W. Martindale?
A. No sir.
Q. Do you have a man by the name of Martindale?
A. No sir.
Q. Have you had such a man in your organization?
A. Yes sir.
Q. Will you state during what period that he was connected with your office?
A. I cannot say accurately, but I should think possibly from 1920 to 1937.
Q. Until 1937?
A. Yes sir.
Q. What was his official capacity and duties, Mr. Warner?
A. Traffic Manager.
Q. Traffic Manager for the Ideal Cement Company?
A. Yes sir.
Q. And the Colorado Portland Cement Company?
A. Yes sir.
Q. The Union Portland Cement Company?
A. Yes sir.
Q. The Three Forks Portland Cement Company?
A. Yes sir.
Q. The Oklahoma Portland Cement Company?
13855 A. Yes sir.
Q. The Arkansas Portland Cement Company?
A. Yes sir.
Q. The Nebraska Cement Company?
A. Yes sir.
13856 Q. Do you know a Mr. L. J. Hoenig, H-o-e-n-i-g? I say, do you know him?

A. Yes, sir.

Q. Who is he?

A. He is the sales manager of the Nebraska Cement Company at Omaha.

Q. Mr. Warner, I now show you a document marked, for identification, as Commission's Exhibit 2237, and ask you to state whether or not you recognize the signature on that as that of Mr. Hoenig?

A. That looks like Mr. Hoenig's signature.

13859 Q. Now, Mr. Warner, I will ask you whether or not you recognize the handwriting appearing on the document marked, for identification, as Commission's Exhibit 2255; that is, the handwriting appearing in the lower left-hand corner thereof.

A. No, sir.

Q. You do not recognize that as the handwriting of someone in your organization, in the Denver office?

A. No, sir, I never saw that hand before.

Q. Mr. Warner, I show you a document marked, for identification, as Commission's Exhibit 581-F, and ask you to state whether or not you recognize that, and, if so, as what?

A. This one (indicating)?

Q. (Indicating.)

13860 A. Yes, sir, that looks familiar.

Q. You recognize it?

A. Yes.

Q. As what?

A. It looks like a copy of a letter that I wrote to Mr. Grier, President of the Mountain States Lumber Dealers Association at Cheyenne, Wyoming, in 1934.

Q. Do you recall the correspondence you had with Mr. Grier on that subject?

A. This is all that does recall the subject in my mind. I would never have thought of it again otherwise.

Q. Mr. Warner, I am showing you documents marked as Commission's Exhibits 874-M and 874-L, and I ask you to state whether or not you recognize those, and, if so, as what?

A. Yes, sir.

Q. You recognize them as what?

A. The first appears to be a letter from Mr. J. A. LeHaney written to myself asking our understanding of the

price of Portland cement f. o. b. cars Glascoe, Montana, and Wyomta, Montana.

Q. That is 874-M?

A. Yes.

Q. And what can you say as to 874-L?

A. The other appears to be a reply giving him our understanding of our price at Glascoe, Montana, and Wyota, Montana.

13861 Q. Do you recall correspondence with Mr. LeHaney on that subject?

A. Only as these two letters bring it to mind. I would never have thought of it again.

Q. What can you say as to documents marked as Commission's Exhibits 874-O and 874-N?

A. May I have your question again?

(The question was read by the Reporter.)

By Mr. MacIntyre:

Q. Do you recognize that?

A. Yes sir; I think I have seen them before.

Q. And you recognize them as what?

A. The first appears to be a communication from Mr. LeHaney discussing his interpretation of the freight rates running from our mill at Tribent, Montana, to Wyota, Montana.

The second appears to be a response giving our interpretation of the freight rates.

Q. 874-N, having been produced from your files in response to a subpoena duces tecum, will you say that that is your letter?

A. Yes sir.

Q. I now show you a document marked as Commission's Exhibit 874-Q and ask you to state whether or not you recognize the hand written signature there, "E. W. M. as the handwriting of Mr. Martindale, your Traffic Manager of that date?

13862 A. It is signed only with his initials, Mr. MacIntyre. It looks as though it might have been written by him.

Q. It appears to be his signature, does it?

A. Just the initials.

Q. That is, his initial signature.

Now, I show you a document marked as Commission's

Exhibits 874-S and 874-T and ask you to state whether or not you recognize that and, if so, as what?

A. The first named appears to be another letter from Mr. LeHaney giving his interpretation of freight rates running to Havre, Montana.

Q. Well now, Mr. Warner, note that the document marked as Commission's Exhibit 874-S has a penciled note attached to it. I will ask you to state whether or not you recognize the handwriting appearing thereon as the handwriting of Mr. Chris Dobbins, your Assistant Salesmanager?

A. It looks as though it might be his handwriting down to this point here (indicating).

Q. That is, all appearing above the letters "CD"?

A. Yes sir.

Q. Do you recognize that appearing below the initials "C. D."?

A. It may be Mr. Kirkpatrick's, but I cannot be sure.

Q. Who is Mr. Kirkpatrick?

A. He was the Assistant Traffic Manager.

13863 Q. In your company?

A. Yes sir.

Q. And his initials were A. W.?

A. A. W. K.

Q. And what can you say as to the handwriting appearing in the lower right corner of Commission's Exhibit 874-S, the word "Colo.", I believe it is?

A. I never saw that before.

Mr. MacIntyre: If your Honor please, this hand-written note that is attached to Commission's Exhibit 874-S was produced by the Colorado Portland Cement Company under subpoena duces tecum. That is the one that was served upon Mr. R. J. Morse of that company; and attached as it is here to that document. But, through inadvertence the Reporter failed to get an identifying number on it as he did 874-S. I will ask that a number be given that document at this time by this Reporter.

Trial Examiner Norwood: Is there just one sheet?

Mr. MacIntyre: Just one sheet.

Trial Examiner Norwood: 2465.

Mr. Leisure: That is for identification you are marking that?

Mr. MacIntyre: That is right.

(The paper referred to was marked "Commis-
13864 sion's Exhibit 2465 for identification.)

By Mr. MacIntyre:

Q. I believe you stated, Mr. Warner, that the handwriting appearing above the letters "C. D." there appears as that of Mr. Chris Dobbins, your Assistant Sales Manager?

A. Yes sir.

Q. And you, I take it, are well acquainted with the handwriting of Mr. Dobbns since he is acting under your direction?

A. Yes sir.

Mr. MacIntyre: If Your Honor please, we will now offer this penciled memorandum, numbered 2465 for identification, that was submitted by the respondent, by the Colorado Portland Cement Company under the subpoena addressed to Mr. R. J. Morse of that company, and which was attached to Commission's Exhibit 874-S and as identified by this witness, and we call your attention to the relationship of the subject matter discussed on that to the relationship of the subjects discussed in the other exhibits about which this witness has been asked.

13866 Mr. Leisure: Mr. MacIntyre, in order to clear that up was my reason for asking the Examiner for permission to ask a few questions on the voir dire. I think the witness was very definite in his reply to me that he did not know whose handwriting it was on the bottom of the page.

13867 Mr. MacIntyre: But the rest of it he has identified as that of the handwriting of his assistant sales manager, and I call your Honor's attention to the fact that the subject discussed in that memorandum is the set of rates that is discussed in documents, Commission's Exhibits 874-L, 874-M, 874-N, 874-O, 874-P, 874-Q, 874-S, 874-T.

Mr. Leisure: Well, of course, there is no evidence to that effect, your Honor, except as the document may or may not speak for itself, and that is the point of my objection.

Trial Examiner Norwood: I shall overrule the objection and receive the exhibit as to the handwriting which has been identified. The other is not to be considered, but I shall leave it on there for further identification, if counsel wishes to pursue it.

13868 (COM. EX. 2465 was offered and received in evidence.)

13871 By Mr. MacIntyre:

Q. Mr. Warner, I show you a document marked as Commission's Exhibit 947-B, and a document marked as 947-c, and ask you to state whether or not you recognize those, and, if so, as what?

A. These two?

Q. This is the first one there (indicating.)

A. I remember something about that.

Q. You recognize that as correspondence passing between you and an official of the Southwestern Portland Cement Company?

A. Yes, sir.

Q. I now call your attention to 947-D and ask you to state if you recall or recognize that, and, if so, as what?

A. No, sir, I don't recall that. It has no date.

Q. It has a receipt stamp appearing on that. Is that a receipt stamp of your office?

A. I believe the traffic department had such a

13872 stamp. They have none now.

Q. That is dated April 5, 1935, isn't it?

A. I don't believe it is connected with this other group.

Q. I now show you a document marked as Commission's Exhibit 947-E and G, F, H, I, and ask you to state whether or not you can recall that as the documentary material referred to, or as material otherwise received by your office from an official of the Southwestern Portland Cement Company?

A. No, sir.

Q. You do not recognize or recall that as land grant rate information the Southwestern sent to your company?

A. It appears to be a description of land grant rate information, but I don't recall that it was sent to our company.

Q. You don't recall this 947-D as the transmittal note under which that was sent to you bearing your stamp of April 5, 1935, sent to you by Mr. Partridge of the Southwestern Portland Cement Company?

A. Mr. Partridge says that the one accompanied the other. I wouldn't question it, but I don't remember the two together, you see, Mr. MacIntyre.

Q. That is not your present recollection of it?

A. No.

13873 Q. Now, I show you documents marked as Commission's Exhibits 947-H and 947-S and ask you to state whether or not you recognize those and, if so, as what?

A. 947-R appears to be a letter from Mr. Reiter, Chairman of the Trade Practice Committee of the Institute.

Q. Would you say that 947-S is your reply to that letter?

A. No, sir.

Q. What is it?

A. 947-S is a letter directed to Mr. Partridge of the Southwestern Portland Cement Company.

Q. Would you say that is a letter from you to Mr. Partridge concerning the land grant rates referred to in 947-R?

A. I have no recollection of it and I wouldn't say that it is, no, sir.

Mr. MacIntyre: Let the record show that when I was referring to 947-S I was showing you a document that wasn't marked 947-S but 947-O.

By Mr. MacIntyre:

Q. I now show you 947-S in connection with 947-R and ask you to state whether or not that is your letter to Mr. Reiter, in reply to Mr. Reiter's letter, 947-R—whether that is a reply?

A. Yes, sir.

13874 Mr. MacIntyre: It was a matter of confusion in the numbers there a few minutes ago.

By Mr. MacIntyre:

Q. Mr. Warner, I now show you documents marked as Commission's Exhibits 947-10A and 947-10B and ask you to state whether or not you recognize those and, if so, as what?

A. The first appears to be a letter from Mr. Brook.

Q. That is 947-10B?

A. Yes, sir.

Q. Would you say that 947-10A is your reply to that?

A. It appears to be a response.

Q. If it was produced from your files you would say that it would be a reply to that letter?

A. Yes, sir.

(The paper referred to was marked "Commission's Exhibit 2467 for identification.)

By Mr. MacIntyre:

Q. Mr. Warner, I am now showing you a document marked for identification as Commission's Exhibit 2467, being a handwritten note that was attached to document marked and received as Commission's Exhibit 948-1R, the latter being—both being documents produced by your concern under subpoena last year.

13875 I will ask you to state whether or not you recognize the handwriting appearing on document for identification 2467?

A. The handwriting appears to be my own.

By Mr. MacIntyre:

Q. In your handwriting. Now, will you state what connection, if any, that you can recall that that docu-

13876 ment, 2467, has—that is, that the subject matter of it has to document marked as Commission's Exhibit 948-I?

13877 Q. I believe you said that the handwriting appearing on 2467, Mr. Warner, is your handwriting?

A. It appears to be mine.

Q. Now, Mr. Warner, I call your attention to documents marked as Commission's Exhibits 948-I and 948-J. I would like for you to refresh your memory and recollection, if you find it necessary, from those two docu-

13878 ments and then state whether—that is, from the contents of those two documents—and then state whether or not you can give us any information concerning the notation that you made on 2467.

A. Mr. MacIntyre, I don't see that there is any necessary connection between this memorandum and these two pieces of correspondence.

Q. Mr. Warner, I didn't ask you if you saw any connection. I asked you to read the contents of those two documents and then see if they refreshed your memory and recollection as to the matter that you wrote about on 2467.

A. No, sir.

Q. Well, can you give us any information from your memory and recollection otherwise as to the matters about which you wrote on 2467?

A. 2467 appears to be a notation that we had filed in Cheyenne a price f.o.b. Cheyenne with the Code Authority

in compliance with the Code of $2.94 per barrel whereas the price should be $2.97.

Q. How did you learn that the price should have been $2.97?

A. It was our own price in both cases and presumed the sum of our maximum mill net plus freight to Cheyenne.

Q. Well, you mean you had two prices in that town, $2.94 and $2.97?

13879 A. No, sir. We only had one, as the second letter here shows.

Q. Well now, is there some connection between 948-I and 2467?

A. Only the clips that attach them, I should say.

Q. Well now, you have in your answer to my question about the two prices appearing in 2467, you have made reference to 948-I. I will ask you why that you made reference to what is shown by 948-I in your explanation of the two prices appearing on 2467?

A. Mr. MacIntyre, there is nothing in 948-I that indicates that two prices are under consideration.

Q. Why did you refer to it in connection with your answer to my question concerning the two prices appearing on 2467?

13880 A. I really understood, Mr. MacIntyre, that you asked specifically that they be referred to together.

By Mr. MacIntyre:

Q. No, you had misunderstood me, then, Mr. Witness. I had asked you to refer to 948-I and 948-J, that is, to the contents appearing thereon, and determine from those, if you could, whether they refreshed your memory and recollection as to the matters that appear on 2467. Now I ask you to state what you know about the matters appearing on 2467.

A. Well, Mr. MacIntyre, I can only say that all I know is what we have discussed here. 2467 indicates that the file price at Cheyenne, our file price at Cheyenne was $2.94 and should have been $2.95, and that information ap-

13881 pears to have been brought to our attention by the subject in Mr. Reiter's letter, Exhibit 948—

Q. —J.

A. —J.

Q. Will you say, therefore, that there is any connection between 2467 and the subject matter of 948-J?

A. Apparently, it is possible that the note was made after reading Mr. Reiter's letter, but the information all appears in Mr. Reiter's letter.

Q. Well, will you consider that you did make the note after receiving Mr. Reiter's letter?

A. Very likely.

Q. Well, would you say that 948-I is a reply to Mr. Reiter's letter, 948-J?

A. Yes, sir.

Q. I will ask one further question on this 2467. That is a document, for identification, 2467, Mr. Warner. I see that although it appears in your handwriting, that it is on a memorandum, a scratch pad sheet, carrying the words "Universal Cement Company". Will you state whether or not you put that on there in the office of the Universal Atlas Cement Company or in your own office?

A. In my own office.

Q. What are the circumstances that caused you to come into possession of a note pad of the Universal Atlas
13882 Cement Company; that is, scratch paper in your office?

A. The Universal Atlas Cement Company market Atlas White Cement, and we purchase that product from them, and they furnish us these pads as evidence of their friendship, perhaps, and we make use of them rather than use our own.

Q. In an effort to promote the good will of their Atlas White Cement, you use their note pads in your own office, is that correct?

A. Perhaps in the interests of economy.

Q. Economy to you and cost to the Universal Atlas?

A. Yes, sir.

Q. You have a man in your organization by the name of G. N. Short, Mr. Warner?

A. Mr. Short is the sales manager of the Three Forks Portland Cement Company at Butte, Montana.

Q. His office is in Butte, Montana?

A. Yes, sir.

Q. I am showing you a document marked as Commission's Exhibit 415-27, and ask you to state whether or not you recognize the signature appearing thereon, Mr. Warner. Do you recognize the signature appearing thereon as that of Mr. C. Boettcher, President of your company?

A. It looks like Mr. Boettcher's signature.

Q. And you are acquainted with his signature; are you not?

A. Yes, sir.

13884 Mr. Grant: If the Examiner please, in connection with the discussion this morning with regard to the corporate situation of Ideal Cement Company, on behalf of that company I would like to make the following statement for the record: That counsel will furnish to the Commission the following information: (1) Date of incorporation and capitalization of Ideal Cement Company; (2) The plants owned and the location of such plants; (3) The dates of incorporation, the capitalization, the amount of stocks owned by and relationship to Ideal Cement Company and the plants, if any, owned by each of the following companies: Colorado Portland Cement Company, United States Portland Cement Company, Union Portland Cement Company, Oklahoma Portland Cement Company, Three Forks Portland Cement Company, Arkansas Portland Cement Company and Nebraska Cement Company; (4) The officers and directors of each of the above companies.

13885 Mr. MacIntyre: May I inquire as to whether or not when you speak of capitalization of the Ideal and of each of these other companies named, that you show in that connection the total outstanding voting stock of each class in connection with the capitalization?

Mr. Grant: Certainly.

Mr. MacIntyre: So that the comparison of the amount owned by the Ideal in those companies could be made with the total?

Mr. Grant: We will give the relationship of each of the other companies, certainly.

Mr. MacIntyre: If your Honor please, one of the last matters on which this witness was examined just before the lunch hour was the document which has been marked, for identification, as Commission's Exhibit 2467.

We would like at this time to offer that document in evidence. In that connection, I show it to your Honor for your examination. Also in that connection we call your Honor's attention to the testimony of the witness on that document, and reference she made to 948-I and 948-J.

Trial Examiner Norwood: Any objection?

Mr. Leisure: That is, this is being offered in evidence?

13886 Trial Examiner Norwood: Yes, that pencil writing.

Mr. Leisure: No, I have no objection. When I say I have no objection, I have no objection to the identification. I do want to point out that it had to do with the filing under the code, and for that reason we maintain our former objections to code material.

Trial Examiner Norwood: Yes.

Mr. Zimmerman: I have nothing to add.

Trial Examiner Norwood: Objection overruled. It is received as marked.

(COM. EX. 2467 was offered and received in evidence.

Q. Mr. Warner, I show you documents marked as 2253-A and B, and ask you to state whether or not you recognize the signature on that document as that of Mr. Nichols, Vice President of the Oklahoma Portland Cement Company.

A. That looks like Mr. Nichols' signature, Mr. MacIntyre.

Q. In so far as you are acquainted with Mr.
13887 Nichols' signature, you accept that as his?

A. I would say that would be his. It looks like his

Q. Now, I show you a document marked as Commission's Exhibit 2240, and ask you to state whether or not you recognize the signature appearing thereon as that of Mr. P. A. Thompson's, Sales Manager of the Oklahoma Portland Cement Company?

A. It looks like Mr. Thompson's signature.

Q. You are acquainted with Mr. Thompson's signature?

A. Yes, sir.

Q. From correspondence coming into your office.

Now, I show you a document marked as Commission's Exhibit 2239, and ask you to state whether or not the signature appearing thereon is that of Mr. L. J. Hoenig, Sales Manager of the Nebraska Cement Company?

13888 A. That looks like Mr. Hoenig's signature.

Q. And you are familiar with his signature from correspondence passing through your office?

A. Yes, sir.

Q. I now show you a document marked as Commission's Exhibit 2238 and ask you if you recognize that, and, if so, as what?

A. That would appear to be a letter written by myself. There is no signature. This is a carbon.

Q. Photostat of an original file carbon.

A. To Mr. C. S. McCardle, Assistant Sales Manager, Universal-Atlas Cement Company with reference to the sale of Atlas white cement to the N. P. Severin Company of Chicago.

Q. Do you recognize it as such?

A. Yes, sir.

Q. Mr. Warner, I now show you document marked as Commission's Exhibit 2252 and ask you to state whether or not you recognize that and, if so, as what?

A. This would appear to be a letter written by myself to Mr. Hoenig, Sales Manager in Omaha, with reference to cement that was being used by contractor Bertrand at Gannett, Nebraska.

Q. Do you recognize it as such?

A. Yes, sir.

13889 Q. Now, when you speak of Sales Manager in Omaha you mean Sales Manager of the Nebraska Cement Company there?

A. Yes sir.

By Mr. Wooden:

Q. Mr. Warner, will you tell us the outer limits of the territory in which the mills affiliated with the Ideal organization sell their standard cement?

A. You have in mind one particular mill, Mr. Wooden?

Q. Well, if you want to take it that way all right, but I was trying to take them as a group or as a whole.

A. I am not sure that I can speak very definitely on the subject of the outer limits of the selling territory of either the Arkansas or the Oklahoma or the Nebraska mills. Those sales are handled by the respective sales officers of those companies.

Q. Well, excluding those for the time being what would be the outer limits of the selling territory of the

13890 other mills affiliated with the Ideal?

A. Generally speaking I should say a line on the west running the boundary of western Nevada, between Nevada and western California, would mark the extreme western limit; possibly the western boundary of the Panhandle of Idaho for the western limit of Montana; our Colorado limit on the east runs a line about north and south midway between the eastern and western boundaries of Nebraska and Kansas, approximately that.

Q. And on the south how far do you go?

A. On the south we go into the Panhandle of Texas down about as far as Lubbock, if we can get business that far south, and New Mexico to a point below Albuquerque, and running west on the line of the Santa Fe as far as Phoenix in Arozina.

Q. Now, in the territory that you have just outlined what other mills are located there?

A. Within the territory outlined?

Q. Yes.

A. The mill of the Monolith Portland Midwest Company at Laramie, Wyoming, the mill of the South Dakota State Cement Commission at Rapid City, South Dakota; the mill of the Portland Cement Company of Utah at Salt Lake City, Utah, and the mill of the Idaho Portland Cement Company at Inkom, Idaho.

Q. Are any of the mills that you have just named
13891 connected in any way through stock ownership or otherwise with the Ideal Company?

A. No, sir

Q. Does Mr. Boettcher have any interest in any of the mills that you have just named?

A. I can't answer that, but I do not believe so. I am sure he does not.

13892 Q. Do mills located outside of the territory that you have named deliver into some portion of that territory that you have outlined?

A. Yes, sir.

Q. How far into that territory do they penetrate?

A. Well, that is a little indefinite, but they come in quite a distance, Mr. Wooden. They can conceivably get business and do solicit business from the East as far as Denver, the north and south line, and west of there on occasions.

Q. You mean that mills, say, in eastern Kansas deliver or sell and deliver out and beyond Denver?

A. They have.

Q. Well, is that a regular or common occurrence?

A. No, sir, it isn't; it is an extraordinary occurrence, but it does happen now and then.

Q. Well, tell us what happens in the ordinary course of events, so far as penetration into that territory from outside occurs.

A. A number of the mills in the Kansas area travel in Colorado, and they come on in and solicit business as far

as one-third of the distance across Colorado and sometimes as far as Denver and Pueblo and Trinidad.

Q. How far do mills from the south come into that territory that you have outlined?

13893 A. Mills from the South come up to the Colorado line on the south, that is, the Colorado-New Mexico boundary.

Q. Mills from Texas?

A. From Texas; yes, sir.

Q. To what extent do mills located on the Pacific Coast come into that territory that you have outlined?

A. They come across practically the entire width of Nevada on the West, and, of course, they cover all of Arizona. They come into New Mexico on land grant rates.

Q. How about the central and northern part of the territory on the Coast, the coast mills?

A. The Pacific Coast mills in the Northwest, do you mean?

Q. Yes, and in upper California.

A. The upper California mills come into the territory in Nevada.

Q. Western Nevada?

A. Western Nevada, and over as far as Alcova, perhaps farther if there was a good order that attracted their attention.

Q. And the Oregon-Washington mills?

A. The Oregon-Washington mills come down into Idaho, and, of course, into western Montana.

Q. Well, does Oregon get into western Montana?

A. No, sir, the Washington mills.

Q. Does Washington or Oregon, either, get into Utah?

13894 A. I think not.

Q. When you have been describing the extent of that penetration, the word I have used, have you had in mind the ordinary course of trade in selling to ordinary customers like dealers, or have you included in it government business to some extent?

A. I should say both, Mr. Wooden.

Q. Well, that means they wouldn't come as far as you have described except on government business; is that right?

A. With the exception of New Mexico, I should say that they come in on both government and commercial business, Mr. Wooden.

By Mr. Wooden:

Q. To the extent that you have described?

A. Yes, sir, approximately to that extent.

Q. Does your Utah mill deliver into Oregon?

A. No, sir.

Q. Why is that?

A. If we were to attempt from the Utah mill to absorb the freight necessary to compete in Oregon, the mill net return would probably not be satisfactory.

Q. Do the Oregon mills deliver into Utah?

A. I thnk not.

Q. Do you know why that is?

A. I can't say.

Q. Do you know whether or not Mr. Boettcher
13896 has an interest in the Oregon mills?

A. I didn't quite hear you.

Q. Do you know whether or not Mr. Boettcher has an interest in the Oregon mills?

A. No, sir. I have heard that he has, but I do not know.

Q. Which ones do you have in mind?

A. The Oregon Portland Cement Company.

Q. Both the mills, you mean? There are two mills. Is that right?

A. I believe it has.

Q. One at Lime and the other at Portland?

A. Yes, sir.

Q. Is that the one Mr. L. C. Newlands is connected with?

A. Yes, sir.

13897 Q. Now, I take it there is some territory, after you deduct the territories that you have described as being penetrated by other mills, where the mills affiliated wth Ideal have only one or two mill competitors, is that right?

A. I am not sure I understand that question, Mr. Wooden.

Trial Examiner Norwood: Read it.

Mr. Wooden: Well, I will make it more specific, if you like.

Trial Examiner Norwood: All right.

By Mr. Wooden:

Q. Take the State of Utah, for instance.

A. Yes, sir.

Q. What competitors do the Ideal Mills have in the State of Utah?

A. The Oregon Portland Cement Company, if they chose to come down there.

Q. If. You said they didn't.

A. We haven't seen them down there.

Q. Give us the actualities. Who does come down there?

A. The Idaho Portland Cement Company, the Portland Cement Company of Utah, the Monolith Portland Midwest Company from Laramie, Wyoming.

Q. All right. Now, how about—do you have some territory in the vicinity of your Montana mill in which
13898 other mills do not penetrate?

A. There is no territory in Montana in which the other mills do not quote or try to sell cement.

Q. What other mills sell there?

A. The mills in western Washington from the west, and mills located at Duluth and—I think there is two concerns that ship from Duluth on the east; also the shippers from Mason City, Iowa.

Q. How about in western Colorado?

A. In western Colorado?

Q. Yes; west of the mountains.

A. West of the mountains we have the Portland Cement Company of Utah coming in from the west and, of course, the eastern mills that semi-occasionally ship in from the gas belt district.

Q. What are the circumstances under which the gas belt mills semi-occasionally get into that territory?

A. Well, purchases of the Forest Service of the United States Government, the invitations are very widely distributed and some of the gas belt mills have bid upon and shipped cement into western Colorado.

Q. Isn't that on land grant rates?

A. I am not sure that land grant rates were involved. They could have been.

Q. Does that involve shipment on Government bill of lading?

13899 A. I do not know whether they shipped on Government bill of lading. On those bids we did not ship on Government bill of lading.

Q. Have any of your mills affiliated with the Ideal

used or subscribed for the freight rate service of the Cement Institute?

A. The Colorado mill receives the freight rate—the list of freight rates that are sent to us by the Cement Institute. I cannot speak for the others. I am not sure.

Q. Did they all receive the service from the Cement Institute relating to land grant rates?

A. We did at one time and I suppose we still do, if there were any changes or inquiries on that subject.

Q. What state freight rate books of the Institute have you subscribed for?

A. For what states?

Q. Yes.

A. I don't believe I can say.

Q. You know some of them, do you not?

A. Well, surely Colorado and New Mexico and Wyoming, possibly Kansas and Nebraska; very probably others but I am not sure.

Q. Do you provide your salesmen with the Institute freight rate books in those states?

A. No, sir.

13900 Q. What do you do with the freight rate books for those states?

A. The traffic office receives those rate books and they are used, I am told, only for comparison.

Q. Comparison with what?

A. With our own rates. We have a complete file of tariffs in our office.

Q. You make your own compilation of tariffs from the tariffs?

A. Yes, sir.

Q. Do you put them up by states and various destinations?

A. Yes, sir.

Q. Do you include the freight from a number of shipping points in your compilations?

A. Yes, sir.

Q. Shipping points at which your mills are not located?

A. Yes, sir.

Q. Are you sure whether or not there is a Colorado freight rate book of the Cement Institute?

A. Now that you speak of it I am not sure.

Q. Have you or any of your companies provided,—

furnished your compilation of freight rates to any other mills?

A. No, sir; only our own.

Q. You have not furnished any to competitors?

A. No, sir.

13901 Q. Never have?

A. No, sir. Pardon me. Unless there was some interchange of information between our Traffic Manager and the Code Administrator.

Q. Have you found that your own compilation of freight rates sometimes varies from the freight rates shown in the Institute books?

A. Mr. Wooden, I do not handle—I do not make those comparisons myself, but I am informed by our traffic office that there are very few differences and those usually occur, if at all, where there is some question as to routing, —more than one route is involved in building up the rate.

Q. And the Institute books don't show the routing, do they?

A. I am not sure that they do. I can't answer that.

Q. What course do you follow when you find there are differences between your own freight compilation and the Institute freight book?

A. We use our own rates, having full confidence in them.

Q. Do you point out the differences to the Institute, or the Institute Freight Bureau?

A. I do not, and I can't answer for the—

Q. (Interrupting) You don't know whether it is done at all or not?

A. No, sir, I do not. If there was any question about authority there might be some discussion, I would

13902 say, but I do not know.

Q. Have you ever had at any of your mills a delivered price at any point that ran as low as 60 cents a barrel?

A. Not to my knowledge.

Q. Did you ever have a mill net at any mill for delivery at a given point that ran as low as 60 cents?

A. Not as far as I know.

Q. Did you ever hear of a delivered price anywhere as low as 60 cents delivered?

A. No, sir.

13904 Mr. Wooden: Your Honor, at this time I reoffer Exhibit No. 2243, for identification, it being one of the papers identified by Mr. Royal as furnished him by Mr. Boettcher, and the witness, I believe, and from their files, the indications being it was written by Mr. Boettcher whom we called here, but who was not able to be present. As to its relevancy, the matter of identification being out of the way, presumably,—as to its relevancy, it goes to the question of what is the selling price of cement.

Mr. Leisure: Your Honor, the exhibit is being offered in evidence, with the witness on the stand, and not one single word has been asked of this witness to identify it as to whether he ever saw it before, or whether it came from his office, whether he knows who wrote it, not one single thing, and it is just being offered again. It was offered and refused yesterday.

Mr. Wooden: It has already been identified.

Mr. Leisure: It certainly stands on no better ground than it did yesterday.

Mr. Wooden: It was not excluded yesterday on the ground of lack of identification but lack of relevancy.

Mr. Leisure: I submit that whether or not the witness knew of cement selling at that price wouldn't be relevant or material to any of the issues unless it is in some
13905 way connected with the case. Just the bare statement of that kind does not make this exhibit relevant, whether the witness knew about it or didn't know about it.

Trial Examiner Norwood: I think its relevancy is now apparent.

Mr. Wooden: Here we have a written statement in the ordinary course of business, you might say, by one of the leaders of the industry showing that he considered the mill net to be the selling price.

By Mr. Wooden:

Q. Do you recall the occasion of Mr. Royal's visit, representing the Federal Trade Commission some years ago?

A. Yes, sir.

Q. Do you recall Mr. Boettcher and yourself permitting him to examine your files and make selections of various papers?

13906 A. I think Mr. Royal indicated certain letters and papers that he would like to see in the files and

that permission was given and he did take some papers from the files.

Q. Was he accompanied by a man named Millwee, representing the Commission, also?

A. I can't remember that.

Q. Did Mr. Boettcher and yourself allow Mr. Royal to borrow the documents so that copies might be made?

A. Yes, sir.

Q. Would you say that 2243 is a copy of one of such papers?

A. Well, Mr. Wooden, I never saw this particular letter before, either the original or the copy from which this photostat was made. Mr. Boettcher's file is in one place in our office, and our files are located at another place in the same office.

13908 Trial Examiner Norwood: It may show the state of mind of one of the respondents with regard to what price is, and I don't see how I can exclude it. The objection is overruled and it is received.

Q. Mr. Warner, showing you Exhibit 1197, did you ever see a paper of that sort?

Mr. Leisure: I don't know what that question means, "A paper of that sort." "Have you seen that paper before?" That might be a question.

Trial Examiner Norwood: I think the word is 13909 intended as a synonym for "class."

Mr. Leisure: Well, I object to it as being too indefinite to be intelligible to a witness.

Trial Examiner Norwood: Objection overruled.

A. I don't recognize it, Mr. Wooden, as anything I have ever seen before.

13911 Q. Now, referring to Exhibit 2251-A and B for identification, do you recall whether or not Mr. Knappenberger or Mr. Newlands came to Denver regarding the bidding for, or on the Owyhee project and 13912 others for which bids were taken about that time?

A. No, sir; I can't say whether they came to Denver in connection with the Owyhee bidding.

Mr. Wooden: Your Honor, this Exhibit 2251-A and B was among those yesterday that you thought sufficient relevancy had not been shown. I am re-offering it at this time and call attention to the obvious fact that it does tie in with Exhibit 1197 and other exhibits that relate to the same transaction.

Mr. Leisure: You are reoffering it at this time, Mr. Wooden?

Mr. Wooden: Yes. And it also ties in with Exhibit 1196.

Trial Examiner Norwood: With what?

Mr. Wooden: With 1196.

Trial Examiner Norwood: Yes.

Mr. Wooden: 1196-F and G.

Trial Examiner Norwood: Yes. Off the record.

(A discussion ensued off the record.)

Mr. Wooden: I think taking those exhibits collectively it will appear that what the memorandum of May 18th indicates was carried out, and that the May 18th memorandum was four days before this letter of Mr. Newlands was written, and the bidding shows that the figures that appeared in the memorandum prior to the bids
13913 were filed by the bidders.

13914 Trial Examiner Norwood: Well, it will take up the time for me to refer to those exhibits. Therefore, I will let counsel for the Commission now retain this until I can get time to compare it with those exhibits.

Go ahead.

By Mr. Wooden:

Q. Mr. Warner, showing you exhibits marked for identification as 2256-A and B, do you know a Mr. Brown connected with the Lehigh Company?

A. Yes sir.

Q. Who is he?

A. Sales Manager at Kansas City.

Q. Do you know any Mr. Brown connected with the Alpha Company?

A. Yes sir.

Q. Who is he?

A. He was President of the Alpha Company. I haven't met Mr. Brown for many years. In fact, I haven't seen either of the gentlemen for some time.

Q. It is not the same Mr. Brown in the two cases?

A. No sir.

13915 Q. Two different Browns?

A. Yes sir.

Mr. Wooden: Then, Your Honor, I desire to reoffer at this time Exhibits 2256-A and B and also 2255, both of which contain references to the two Mr. Browns the wit

ness has referred to, and from which references the relevancy of the two documents, I think, will appear.

13918 Q. Mr. Warner, showing you a paper marked as 2468, for identification, do you recognize the signature to that?

A. Yes, sir.

Q. Whose is it?

A. That is Mr. Dobbins, Assistant Sales Manager of the Colorado Portland Cement Company.

Q. Showing you a paper marked 2469 and a paper marked 2470 for identification, do you recognize that correspondence, and, if so, what is it?

13919 A. I think I remember something about this, Mr. Wooden. This is a copy of a letter to which this was a response. There is no signature on it.

Q. Is it your response?

A. Yes, sir.

Q. 2470 is your response to 2469?

13920 A. Apparently.

Mr. Leisure: What are those numbers, Mr. Wooden? We didn't get that.

Mr. Wooden: 2469 and 2470.

A. There is no signature on the first.

By Mr. Wooden:

Q. I believe you replied to it as shown by 2470?

A. Yes.

Mr. Wooden: I am sorry to have interrupted.

Trial Examiner Norwood: Regarding the proffer of Commission's Exhibit 2256, for identification, 2256-A and B, I shall defer ruling on that until tomorrow. I will study them along with these other papers.

By Mr. Wooden:

Q. Is it your signature on 2470, for identification?

A. Yes, sir.

Q. Do you know a Mr. Allen T. Flint, Secretary of the Mountain States Lumber Dealers Association?

A. Yes, sir.

Q. Have you discussed with Mr. Flint the subjects relating to what is an equipped, established and legitimate cement dealer?

A. We may have, Mr. Wooden, but I don't recall any specific instance.

Q. Have you ascertained from Mr. Flint the
13921 names of those he regarded as equipped, established and legitimate cement dealers?

A. Not in that way. The Mountain States Lumber Dealers Association publish a list of recognized dealers.

Q. Did you ever receive that?

A. We have received it; yes, sir.

Q. Have you inquired at times about the status of certain parties as to their being established and equipped cement dealers?

A. Yes, sir.

Q. Made the inquiry from Mr. Flint?

A. Made it for him?

Q. From him, or to him, rather?

A. We may have. However, it is our practice to reach those conclusions independently of Mr. Flint's belief in the matter.

Q. But you do ascertain what his belief is?

A. We may have on occasions. I can't recall any particular time.

13922 *Cross-Examination by Mr. Leisure.*

Q. Mr. Warner, Mr. MacIntyre showed you a slip of paper in which certain figures on the scratch pad of the—in which certain figures on the Universal-Atlas scratch pad had been made in your company. I think you explained to Mr. MacIntyre that you are the selling agent for their white cement?

A. Yes, sir.

Q. With respect to that I show you an exhibit, 2238, which appears to be your letter to the Universal-Atlas Company, dated April 2, 1930, and ask you whether or not you recall having written that letter?

A. Since seeing this copy I think I do recall something about it.

By Mr. Leisure:

Q. And you were then dealing with your selling agent—in writing the letter you were dealing with your selling principal, rather—you as selling agent?

13923 A. Yes, sir.

Q. Writing with reference to white cement, is that right?

A. Yes, sir.

Q. On another subject, Mr. Warner, this morning Mr. MacIntyre asked you with regard to Mr. Boettcher's attendance at Cement Institute meetings, page 13845, and suggested to you that the minutes would show that Mr. Boettcher attended certain meetings prior to November 23, 1933, namely meetings in 1930. I have examined these and I ask you to look at them and, having refreshed your recollection from these exhibits, tell us whether or not your testimony is the same as it was this morning, that Mr. Boettcher did not attend any meetings prior to November 23, 1933?

Mr. MacIntyre: Your Honor please, we object to the nature of that cross examination on this ground: The witness is now being shown two or three sets of minutes of meetings of the Cement Institute during 1930, which he has not stated that he attended, and asked by the counsel to refresh his memory from those and state definitely whether or not Mr. Boettcher ever attended any meeting of the Cement Institute during 1930. It is obvious from the question that the witness could not possibly refresh his memory from looking at two or three sets of minutes
on the point as to whether Mr. Boettcher ever at-
13924 tended a meeting during 1930 of the Institute.

Mr. Leisure: Your Honor, the form of Mr. MacIntyre's inquiry this morning has made it necessary for me to follow that up because Mr. MacIntyre stated this morning, and I have given the pages on the record, that an examination of those exhibits would show that Mr. Boettcher did attend those meetings. Now, an examination of those minutes does not disclose that Mr. Boettcher did any such thing

Trial Examiner Norwood: Did he specify these minutes?

Mr. Leisure: Yes, sir. I have given the page of the
record.

13926 Mr. Leisure: Well, perhaps we can save time.

By Mr. Leisure:

Q. Have you had anything brought to your attention which would cause you to want to change your testimony in any way from what you gave this morning with respect to Mr. Boettcher's having attended these meetings?

A. No, sir.

Q. It is the same as it was this morning?

A. The same as it was this morning.

13930 Y. E. McCLENDON, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. MacIntyre.

I am employed in the Purchasing Department of the Oklahoma State Highway Commission in the capacity of Assistant Purchasing Agent and have been so employed for four years covering the years 1935-38. Previous to that I was Purchasing Agent for the Oklahoma State Highway Commission. I think I was made Purchasing Agent in 1932, and previous to that I was in the Engineering Department, Assistant to the State Mainte-
13931 nance Engineer of the Oklahoma State Highway Commission. During the period of years I have been so employed, in connection with my employment, I have had access to bids and other documents relative to the bids that were received from cement manufacturers by the Oklahoma State Highway Commission.

Q. Will you state if you can, the policy followed by the State Highway Commission,—that is, Oklahoma State Highway Commission in its purchase of cement, whether direct from cement manufacturers or indirect through other sources?

A. Well, cement purchases have all been made direct from the cement manufacturers.

Q. For all purposes; that is, construction, maintenance and repair?

A. Well, in the construction the award purchase was made, or the requirements for that particular work was handled by the Engineering Department, purchased by contractors and, I presume, bought direct from manufacturers. I don't know.

Q. That is, by the contractors?

A. Yes, sir.

Q. Purchased from the manufacturers by the contractors in those cases?

13932 A. Yes, sir.

Q. How long has that been the policy of purchasing cement for construction purposes?

A. By the contractors?

Q. Yes.

A. Well, outside of 1931 I presume it has always been the policy of the Oklahoma State Highway Commission.

Q. Did it, in 1931, make efforts to purchase otherwise; that is, direct or otherwise?

A. No. What I had reference to in 1931, the Commission bought cement direct from the cement manufacturers and furnished to contractors themselves.

Q. But that is the only year that the Commission did so with respect to cement for construction purposes?

A. Insofar as my recollection is concerned it is.

Q. What was the result of that effort, if you can tell us?

13933 Trial Examiner Norwood: He has already said that they did buy. He said they did buy.

By Mr. MacIntyre:

Q. In what way were the purchases handled during that year? Did you ask for sealed bids from the cement manufacturers?

A. You mean on the purchases made for 1931?

Q. Yes.

A. Yes, sir; there was sealed bids requested.

Q. From a number of manufacturers?

A. Yes, sir.

Q. Were bids received and opened on more than one occasion during 1931?

A. Yes, sir, I think there were.

Q. If more than one, how many occasions, if you can recall?

A. Well, I didn't handle that myself personally. That was handled by the Engineering Department. But, my recollection on the matter is that in the early part of 1931, possibly sometime in February, they asked for their first bids.

There was an award purchase made and I think 13934 later cancelled out on, and in March of the same year they asked for bids again.

I think the files disclose that—

Q. Will you proceed, Mr. McClendon?

A. I think the files will disclose that those bids were both rejected and received bids on April 14th, and the award purchases made on the basis of those bids received at that time.

Q. On the basis of the bids of April 14, 1931?

A. Yes, sir.

Q. Can you state, if you know, why the bids received during February and March were rejected?

A. No, sir, I could not.

Q. What were the quantities that were involved in the awards of 1931 for construction purposes, Mr. McClendon?

13935 A. I think in the original set-up it was around 1,000,000 barrels and later reduced, I think, on April 14th, to 800,000.

Q. I believe you have stated that the purchases now do not involve purchases for construction work, that is, the purchases of cement made direct by the Oklahoma State Highway Commission.

A. Not the purchases we are making, no, sir, don't involve construction by contract forces.

Q. That is, you are only buying cement now for maintenance and repairs?

A. Yes, sir, or such supplemental construction work that we might be doing with State Highway Department forces.

Q. And what amounts do you buy for maintenance and construction purposes annually now, Mr. McClendon?

A. I don't know just what the exact figures would be.

Q. Approximately.

A. Approximately I would say between fifty and seventy-five thousand barrels.

Q. Annually?

A. Yes, sir.

Q. How much, if you can tell us—what has been the quantity, if you can tell us, of cement purchased in terms of barrelage by the contractors for use in construction work?

13936 A. That is strictly a matter that is handled in the Engineering Department, and I wouldn't have any idea at all about it.

Q. Can't give us any approximate figures on that?

A. No, sir.

Q. With respect to these purchases during the last four years, 1935, 1936, 1937 and 1938, the purchases of cement by the Oklahoma State Highway Commission direct from manufacturers for maintenance and repair work, do you take bids from more than one manufacturer before making awards in those cases?

A. Yes, sir.

Q. How many, as a rule, do you seek and receive bids from?

A. Oh, take it on the average I believe there would be about seven or eight. That is not always the case. Sometimes there is not that many. Sometimes there are only three or four of them bid.

Q. And how often do you seek bids from manufacturers to furnish cement for maintenance and repair work?

A. That is governed by our program of work.

Q. Well, as a practice, do the facts show that you have bought many times during a year or just once a year for maintenance?

Q. Several times during the year?

A. Yes, sir.

13937 Q. At any time less than carload quantities or in carload quantities or more each time?

A. Carload quantities or more.

Q. You do not buy in less than carload quantities, then?

A. Not very often. It is very seldom that we ever do.

Q. Can you state, if you know, why those purchases are made no longer direct from manufacturers for construction purposes?

A. No, sir. I couldn't answer that. I don't know.

Q. Can you state, if you know, how the amount of new construction work during the years 1935, 1936, 1937 and 1938 compared with the amount of construction work undertaken by the State Highway Commission during 1931?

A. No, sir.

13938 Q. Mr. McClendon, I now show you papers which have been marked for identification as Commission's Exhibits 2471 to 2595, inclusive, and ask you to state what they are, Mr. McClendon.

A. They are tabulations of bids received on our cement requirements as bought by the Highway Commission on January 1, 1935 to October 14, 1938.

Q. Have you brought here with you not only these tabulations of the bids but the bids or quotations upon which they are based?

A. Yes, sir.

Q. By the manufacturers?

13939 A. Yes, sir. I think I have them all.

Q. And do we have an understanding from you

that we may hold these and return them to you later after they have been used in connection with this case?

A. Yes, sir.

Mr. Zimmerman: What do you mean "these"? These tabulations?

Mr. MacIntyre: Tabulations and the bids for checking against the tabulations.

A. Yes, sir. I have been authorized by our Chairman to do that.

By Mr. MacIntyre:

Q. Can you state, Mr. McClendon, when and why the tabulations of the bids were made by your department? Were they made at the time the bids were received?

A. Yes, sir; about that time.

Q. Why were they made up in your department at that time?

A. Why were they made up?

Q. Yes.

A. To determine as to what the bid price was going to be on our requirements.

Q. You determined from the tabulations, then, what the bid prices were?

A. Yes, sir.

Q. And was any action taken by the State High-
13940 way Commission on the basis of the determination thus made?

A. Yes, sir.

Q. What action was that? Was it in the form of making an award?

A. Making an award of purchase.

Q. In case that you had tie bids at any time, how were awards made to any particular manufacturer or manufacturers?

A. Our purchase of cement was always made on the lower bid if there was any difference in price.

Q. Well, in the event that you had any situations where there were not, as shown by your tabulations of bids, low bids, but tie bids, how were awards made in those instances?

A. Up until the Marland administration we purchased our cement one hundred percent between the Oklahoma Portland Cement Company and the Dewey Portland Cement Company.

13941 Q. Was it divided equally?

A. No, sir. It was not divided equally.

Q. How was the division made with respect to the purchases from those two concerns?

A. Well, we tried to make it as near equal as possible, but that wasn't always the case.

Q. The purchases were made from those two concerns in that manner when tie bids occurred; is that correct?

A. We bought from the Oklahoma producers.

Q. But if you had a low bid on any occasion, of course, your purchase would be made from the low bidder?

A. It would be made from the low bidder.

Q. Is that required by law, or how was the policy in that direction developed?

A. I don't know whether there is any legislation that covers that or not. I understood there was, but I wouldn't be positive about it.

Mr. Leisure: Will you fix the date, Mr. MacIntyre? The witness said up to the Marland administration, and the record does not show any date in there.

By Mr. MacIntyre:

Q. Will you give us the date of the begining of the Marland administration?

A. I believe it was 1935, January, 1935.

13942 Q. That would cover all the period covered by these tabulations that you have before you here?

A. Yes, sir.

Q. That is, tabulations marked 2471 to 2595?

A. Yes, sir.

Q. I believe you stated that up to the Marland administration, that the policy was followed as you described. What has been the policy since then in case of tie bids?

A. There has been some instances, you will find from the tabulation of these bids, where purchases were made from the Ash Grove Lime & Cement Company. I believe that is the title of the company.

Q. That is, in case of tie bids?

A. Yes, where the bids were identical.

Q. How did you arrive at the determination to give the business to the Ash Grove Company in case of tie bids?

A. I couldn't answer that question because the award and purchase is made by the Oklahoma State Highway Commission, and as to what their reason for that it, I

don't know. You want the tabulation for April 14, is that it?

Q. We would like for you to bring out the tabulation for April 14, 1931.

A. All right.

(The witness produces a blueprint tabulation.)

Mr. MacIntyre: Give that the next number.

(A blueprint referred to was marked "Commis-
13943 sion's Exhibit 2596" for identification.)

By Mr. MacIntyre:

Q. Mr. McClendon, I show you a tabulation which has been marked, for identification, as Commission's Exhibit No. 2596. I ask you to state what that is.

A. That is a tabulation of bids for cement received April 14, 1931, by the Oklahoma State Highway Commission.

Q. Do you have the bids upon which this tabulation is based?

A. No, sir; I do not.

Q. Does the Oklahoma State Highway Commission have such bids available to it?

A. I couldn't say that they do.

Q. Did you make a search, or was there a search made in your office for such bids?

A. I don't—there wasn't any made in my office.

Q. I mean the office of the Oklahoma State Highway Commission.

A. Not that I know of.

Q. Will you please inform us whether you will have such a search made in the office of the State Highway Commission for the bids upon which that is based?

A. I will.

Q. And let us know by letter whether or not the bids are available?

13944 A. I will.

Mr. MacIntyre: Give that the next number.

(A paper writing referred to was marked "Commission's Exhibit 2597 for identification.)

By Mr. MacIntyre:

Q. Mr. McClendon, I show you a document which has been marked for identification as Commission's Exhibit No. 2597 and ask you to state what that is, if you know.

A. That is a memorandum prepared for the minutes of the Oklahoma State Highway Commission, dated April 18, 1931, signed by A. R. Laush, formerly Chief Engineer of the State Highway Engineers, Oklahoma State Highway Commission, making the award and purchase of 800,000 barrels of cement, and these awards were made on the basis of bids received April the 14th.

Q. I wonder if we can't hold this for a while until we determine whether we would like to offer a photostatic copy of it?

A. All right.

Q. And then return the original to you.

Mr. MacIntyre: Off the record.

Trial Examiner Norwood: Off the record.

(A discussion ensued off the record.)

Mr. Leisure: Mr. MacIntyre, if you are going to offer that after the witness leaves the stand, I prefer
13945 for it to be offered while he is on the stand, and we can substitute photostats if that is necessary; I don't know whether that is what you intend to do, but if you do, I prefer to have you offer it while the witness is on the stand.

Mr. MacIntyre: Well, that may depend upon whether or not we finally make an offer of the preceding exhibit, 2596. That is a tabulation of the 1931 bids, and whether that tabulation is offered would depend upon the availability of the bids and our presenting them to you for an examination for checking purposes. That is, it may depend upon that. So we don't want to take the time of attempting to offer something here this afternoon that we may take less time in considering it on some later date.

Off the record.

Trial Examiner Norwood: Off the record.

(A discussion ensued off the record.)

Mr. MacIntyre: Mark these three pages here.

(The paper writings referred to were marked "Commission's Exhibits 2598-A, B and C" for identification.)

By Mr MacIntyre:

Q. Mr. McClendon, I am showing you documents which have been marked for identification, as Commission's
13946 Exhibits 2598-A, B and C. I ask you to state what they are, these three pages.

A. Well, that is minutes of the meeting of the State Highway Commission held at the office of the Oklahoma

Commission in the State Capitol Building at Oklahoma City, February 9, 1931, in which was made the award of cement contracts.

Q. Do those—

A. For a million barrels of cement.

Q. Do those three pages that are marked as 2598-A, B and C cover all of the minutes of that particular meeting of the Oklahoma State Highway Commission that dealt with the cement awards?

A. Yes, sir, it does.

Q. In other words, the other portions of the minutes deal with other things?

A. Yes, sir.

Q. I now ask you, Mr. McClendon, whether or not you will furnish us with photostatic copies when you return to your office of those three pages that are marked, for identification, 2598-A, B and C?

A. Yes, sir, I will.

Q. And certify them as being true and correct copies of your records in accordance with your testimony here today?

A. Yes, sir.

13947 Mr. MacIntyre: Off the record.

Trial Examiner Norwood: Off the record.

(A discussion ensued off the record.)

Trial Examiner Norwood: Back on the record.

Mr. MacIntyre: Your Honor, we now offer in evidence tabulations of bids bearing Commission's Exhibit numbers, for identification, 2471 to 2595, inclusive, the tabulations of bids as described by the witness, and we have here, as the witness has already explained, the basic data upon which these bids are based, and we tender that basic data to the respondent counsel for checking against these tabulations, and we ask that they be accepted in evidence just as other tabulations of bids have heretofore been accepted in evidence in this case.

Mr. Leisure: Now, the basic data obviously is not here because the witness says he hasn't got the bids here, and it seems to me that the offer is premature at this time until we do have the basic data.

Trial Examiner Norwood: That is with respect to Exhibit 2596, that tabulation.

Mr. MacIntyre: We are not making an offer on that, Mr. Leisure. That is the 1931 letting. These are all let-

tings of 1935 to 1938, inclusive, and we do have all the basic data here on those.

13948 Mr. Leisure: And as to those, you have all the bids, and we have, at least, a sample of each invitation? At least one invitation as to each bid?

Mr. MacIntyre: We may ask the witness as to the invitations that were issued and just what the facts are on that.

By Mr. MacIntyre:

Q. What about the invitations on these bids received from 1935 to 1938, inclusive, Mr. McClendon?

A. You want to know how those files are constructed?

Q. How do you seek bids such as these, or how did you seek bids such as these during the years of 1935-1938, inclusive?

A. We have our own quotation request asking for prices on our material requirements, and they are mailed out on our mailing list.

Trial Examiner Norwood: Have you copies of those?

The Witness: And copies of those are in each file, each quotation file.

By Mr. MacIntyre:

Q. Along with the—

A. Along with the quotations.

Q. With the quotations that came in in response to that?

A. Yes, sir.

Q. And that, of course, is available for our checking just as the bid or quotation itself?

A. The files are complete.

13949 Mr. Leisure: As heretofore pointed out, there should be one of those quotations as filled out in connection with the bid—with each bid. Otherwise we don't have the complete picture.

Q. Were they uniform throughout the years?

A. They are pretty uniform,—fairly uniform all the way through.

Q. Well, can you select us, say, a half a dozen that would represent—

A. (Interrupting) Yes.

Mr. Leisure: One sample for each tabulation. If they are uniform,—if we can have enough to show they are uniform, Your Honor, that would answer the same question.

Trial Examiner Norwood: Yes.

Mr. Leisure: Providing we had one at the begining and one at the end.

13950 The witness identified Com. Exs. 2599 A to G, 2600 A-J, 2601 A-K, and 2602 A-H, as quotation files in connection with the Highway Commission's request No. 8819, 7077, 4957 and 4269, which represented all of the forms of invitation for bids that were used as a basis for the tabulations which had been marked as Com. Exs. for Identification 2471 to 2595.

Mr. MacIntyre: If Your Honor please, we now amend the offer on the exhibits 2471 to 2595, inclusive, to include also the exhibits marked 2599-A to G, inclusive, 2600-A to J, inclusive, 2601-A to K, inclusive, and 2602-A to H, inclusive, with the same understanding that the basic data in the form of the other bids and invitations upon which these tabulations of bids are based are available to
13951 the respondents' counsel for checking as to the accuracy of the tabulations of the bids; and we would also like to ask for leave to substitute photostatic copies for the originals within this offer so that we may return the originals to the witness.

13952 Q. Mr. McClendon, do you have tabulations of the bids of the two lettings which you stated were rejected and on which no awards were made previous to this April 14, 1931, tabulation that you referred to and which is now marked for identification as Commission's Exhibit 2596?

A. No, sir, I do not have the tabulations for the February and March requests.

Q. You say you do not have the tabulations?

A. No, sir.

13953 Q. Are they available in the offices of the Oklahoma State Highway Commission so far as you know?

A. I don't know. If they are they are in the Engineering Department and I would have to check it up.

Q. Would you, if you can locate them along with the other bids upon which 2596 is based, send us those?

A. Yes, sir.

Q. Or, at least, a statement that they are available?

A. Yes, sir.

Mr. MasIntyre: May we have a ruling upon the pending offer?

Trial Examiner Norwood: Any objection? Any further objection to the offer?

Mr. Leisure: Before I state any objection may I ask the witness a question about this exhibit on voire dire?

Trial Examiner Norwood: Certainly.

Examination on Voir Dire by Mr. Leisure.

Q. 2602-A, which I hold in my hand, I am now referring you to 2602-C, which is within the same folder. Is that what you send to—2602-C, is that what you send to the cement companies? 2602-C, when you invite them to bid?

A. This is our form when we request a bid.

Q. That is the form?

13954 A. Yes, sir.

Q. Are there additional forms enclosed upon which they may submit their bids, if they choose to bid, when you send these to them, such as 2602-C?

A. No. We have a regular form of quotations but we don't send that out when we send out our request because the people doing business with the State, ordinarily they have got a supply of those forms anyhow and we don't send them out.

13955 Q. They have other forms that are printed by the state which they fill out?

A. They have that form.

Q. They have the form, 2602-E?

A. That is our quotation.

Trial Examiner Norwood: Off the record.

(A discusison was had off the record.)

Mr. Leisure: As to these tabulations that are now being offered, 2477, 2479, 2494, 2580, 2593, are tabulations showing only one bid.

Trial Examiner Norwood: Yes.

Mr. Leisure: So that we will object to them as not proving anything within the issues of the pleadings and we further object to all of this group of tabulations at this time on the ground that it is purely cumulative. We have had so much of this kind of evidence, I think there should be some point at which there is no necessity for adding further tabulations. We object to it on that ground.

Mr. MacIntyre: If your Honor please, we do not feel that the submission of evidence of identical bids up to

this point has been unduly cumulative. It is by necessity of the nature of the charge in the complaint that it must to a degree be cumulative. It is a question as to
13956 where and when it becomes unduly so, and we do not believe at this point with respect to the selection, or, at least, picking at random seven or eight to ten states out of forty-eight, as to their experiences in the purchase of cement directly from the cement manufacturers can be considered as being unduly unnecessary with respect to the proving of the allegations within the complaint as to identical prices bid.

Trial Examiner Norwood: I don't see that as long as they relate to different dates or other states that I could consider them cumulative. It relates to new territory.

Mr. Leisure: Even as to the one state it is cumulative. Even if Mr. MacIntyre's statement made them admissible, here is one with 100 from one state. Even if it were true that you could select certain sections, it is not necessary to put in 100 of them from one state.

13958 Mr. MacIntyre: If your Honor please, in an effort to save time on those, we will be happy to withdraw the offer on those particular ones, merely exclude them as to this offer. We merely included them so the offer would be complete on the four years on all bids.

Trial Examiner Norwood: These that are withdrawn are 2477, 2479, 2494, 2580 and 2583.

13959 Trial Examiner Norwood: Examine him.

Mr. Zimmerman: I have no cross.

Mr. Leisure: No questions.

13960 W. A. WECKER, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am an executive in the cement manufacturing business. I am an officer of the Marquette Company and hold the position of President and Treasurer and have held that position since July 1933. Prior to that time I had been connected with that company in various capacities.
13961 To begin with I was a clerk in the general office. Then I took on credit work, credits and collections.

My clerkship began in January 1914. I have served about a year in that capacity. I became Credit Manager in charge of the credits and collections of the company. I traveled as a traveling collector. I retained that position until about 1920 or 1921, at which time I became Secretary of the company. In 1923 I became, in addition to
13962 Secretary, Treasurer. In 1931 or 1932, I forget which, I was made a Vice-President in addition to Secretary and Treasurer, which positions I held until July 1933.

A. The present corporation, I believe, dates back to 1898.

Q. Where is its mill or mills located?

A. At Oglesby, Illinois, and at Cape Girardeau, Missouri.

Q. Is Oglesby, Illinois, frequently referred to as La-Salle?

A. That is right, I believe. Our mail address is La-Salle.

Q. What other mills are located at LaSalle or Oglesby?

A. A mill of the Alpha Portland Cement Company is located at LaSalle and a mill of the Lehigh Portland Cement Company is located at Oglesby.

13963 Q. When was the Cape Girardeau mill established?

A. I don't know when the Cape Girardeau mill was established.

Q. Well, was it ten years or more ago?

A. Well, I dare say it was. We have owned it more than ten years.

Q. What is the capacity of each of those mills?

A. The capacity of our LaSalle mill is approximately 5,000,000 barrels per year, and of our Cape Girardeau mill approximately 1,600,000 barrels per year.

Q. To what extent has the Cape Girardeau mill used water transportation in the delivery of cement?

A. We transport cement from our Cape Girardeau mill in our own barges and propelled by our own tow boats to storage and packing plant terminals located at St. Louis, Missouri, and Memphis, Tennessee.

Q. It water transportation used out of your storage plants at St. Louis and Memphis?

A. Not to my recollection, no sir.

Q. Do I understand that the only water transportation used has been to St. Louis and Memphis?

A. No, not altogether, Mr. Wooden.
Q. Well, will you add to that, then?
A. Occasionally we deliver cement in our own barges and propelled by own tow boats to serve jobs which we have sold at points along the rivers.
13964 Q. What rivers do you refer to?
A. The Mississippi River, the Ohio River, the Tennessee River and—well, I think in general that is all.
Q. The Missouri?
A. I think not.
Q. How far—give us some idea of the points on those rivers to which you have made deliveries that way.
A. Oh, that I couldn't recall, Mr. Wooden.
Q. Have you delivered up as far as Cincinnati?
A. No sir.
Q. As far as Louisville?
A. I believe not.
Q. As far as Evansville?
A. Possibly, but I have no recollection.
Q. How far up and down the Mississippi have you delivered cement by water?
A. Outside of our terminals?
Q. Yes.
A. Well, I would say that we have gone down the Mississippi River, Oh, half way the distance to our terminals to deliver cement by water.
Q. Half way the distance to your terminals?
A. Yes.
Q. I see. What points would you have in mind there?
A. Well, I have no recollection of the points, Mr. Wooden.
13965 Q. Have you delivered down the Mississippi as far as Greenville, Mississippi?
A. Not to my knowledge, no sir.
Q. From Memphis?
A. No sir; under no circumstances.
Q. From no place?
A. No sir.
Q. How far up the Tennessee or Cumberland Rivers have you delivered by water?
A. Well, I can't recollect that, Mr. Wooden.
Q. Don't you have any idea?
A. No sir. I couldn't name you any point. I am sorry.
Q. Have there been any water deliveries possible from your Oglesby plant?

A. Well, not without an intervening rail haul.

13966 Q. Do you actually use any water deliveries?

A. Yes, sir.

Q. What do you use?

A. We have on several occasions delivered cement to job sites on jobs we have sold, from our LaSalle plant by water.

Q. Give us an illustration of such a job.

A. Well, now, I can't recall.

Q. Have you ever gotten into Chicago by water plus rail?

A. Yes, we have delivered some cement in Chicago by barge to a specific job.

Q. Have you ever made any deliveries in Chicago to the regular trade there through barges?

A. Well, what do you mean by "regular trade"?

Q. Well, dealers, for instance?

A. I don't recall any.

Q. You don't recall any?

A. No, sir.

Q. Have you delivered in Chicago, for warehouse storage by barge?

A. I don't recall any; no, sir.

Q. To what extent have your two mills made deliveries of cement by truck?

A. Well, very, very little.

Q. Do you have any trucks of your own?

A. No, sir.

13967 Q. To what extent has your company loaded for delivery on trucks at your mills?

A. What is that?

Q. Trucks furnished by the buyer?

A. What is that?

Mr. Wooden: Read the question.

(Question read.)

A. I would say very little.

By Mr. Wooden:

Q. Do you have any differentiation in your mind on that question as to time or was there one time when you did more of it than another?

A. Why, I think not. I have always been opposed to the idea of having trucks running around our yards.

Q. Is Marquette a member of the Cement Institute?

A. No, sir.

Q. Has it been at any time?
A. Yes, sir.
Q. During what time?
A. We became a member of the Cement Institute at the time of the NRA code.
Q. And continued until when?
A. And we continued until some time in 1936 to '37.
Q. Are you sure about the time of your resignation? I assume it was resignation. You said you discon-
13968 tinued membership, anyway. Was it resignation?
A. Yes. Well, now, I don't know. I don't remember the date, Mr. Wooden.
Q. Did your company maintain a membership during any period of time in the Portland Cement Association?
A. Yes.
Q. What period of time?
A. Well, which end do you want me to begin on?
Q. It doesn't make any difference to me; just so you get both ends.
A. Shall I go back?
Mr. Zimmerman: Go back to the extent of your knowledge.
Mr. Wooden: Oh, yes.
A. Well, we have been members of the Portland Cement Association continuously from the present back to, I believe, the end of 1933.

By Mr. Wooden:
Q. And then prior to that time?
A. Prior to that time I recollect that we were in and out a great deal, but I have no knowledge of it at present.
Q. Were you in the Portland Cement Association during 1931?
A. Well, now, I can't say exactly, but I have an idea we weren't.
Q. Did you go out in '32?
13969 A. Well, now, if we weren't in in 1931 we could hardly go out in 1932.
Q. I thought you said you were in in '31.
A. No, I thought I said that we weren't in in 1931.
Q. Oh, I misunderstood.
Did you go in again in 1932?
A. Why, I don't recall that, Mr. Wooden.
Q. Can you ascertain definitely the dates on which you went in and out at various times?

A. Oh, I am sure we can ask the Portland Cement Association; they can tell us.

Q. Will you state the circumstances, Mr. Wecker, under which you first became a member of the Cement Institute?

A. Well, the NRA code came into being, and a code was being worked on to regulate the industry under
13970 the National Recovery Act, and it seemed to be necessary to come into the trade organization or the Cement Institute at that time in order that we might have a voice in the proceedings.

Q. You say it seemed necessary. Do you mean by that that you went in more or less unwillingly?

A. Oh, decidedly.

Q. What were the grounds on which your unwillingness to go in rested?

A. Well, I think the NRA forced it.

By Mr. Wooden:

13971 Q. Well, that wasn't my question.
What were the grounds of your unwillingness to go in?

A. I don't know that I can recall any particular ground of unwillingness.

Q. You don't know why you were unwilling to go in?

A. No, I don't remember that.

Q. Did you have objections to the provisions of the code that you were going in under?

A. Certainly.

Q. Did you have objections to the provisions of the code that you went in under?

A. Certainly, and we voiced them.

Q. You don't remember what any of those objections were?

A. No, I don't remember.

Mr. Wooden: Give that a number, please.

(A paper writing referred to was marked "Commission's Exhibit 2603-A to E," inclusive, for identification.)

By Mr. Wooden:

Q. I show you a paper on the purported letterhead of the Marquette Cement Manufacturing Company, dated August 9, 1933, and marked for identification, 2603-A to E, inclusive.

Have you seen that paper before, or tell us what it is.

13972 A. Those, Mr. Wooden, I believe, are the objections to the proposed code which I was telling you about.

13973 Q. And which you didn't recall?

A. No.

Q. I notice this paper is merely addressed "Dear Sir." What did you do with that paper? What use was made of it?

A. This is our position on the proposed Code, as I recall it, and we mailed it, I believe, to the Cement Institute or the Code Authority, I don't know which, or both, and we also sent copies, I believe, to all members of the industry.

Mr. Wooden: I will offer this 2603-A to E, inclusive, Your Honor.

13974 (COM. EX. 2603 A to E, inclusive, was offered and received in evidence.)

Q. Mr. Wecker, I am showing you papers marked 13975 for identification as Commission's Exhibits 2604-A to F, inclusive, purporting to be a tabulation of bid prices or bids on the Illinois Highway Department for April 12, 1933. Will you tell me what those papers are?

A. I don't recognize this, Mr. Wooden.

By Mr. Wooden:

Q. Do you recall a visit from a Mr. C. M. Johnston representing the Federal Trade Commission in 1933?

A. No sir.

Q. Do you have any recollection concerning the longhand note up in the upper left hand corner of the first page, 2604-A? Does that refresh your recollection as to what the papers are?

A. No sir.

Q. Do you mean to say that you never saw them before?

A. I don't think I did.

Q. Do you recall whether or not your company prepared for a representative of the Commission by the 13976 name of C. M. Johnston a statement—not prepared for him; gave him a statement showing the bid prices of the Marquette Company on the Illinois highway bids of April, 1933?

A. Well now, Mr. Wooden, I told you that I didn't recall this man at all, so I couldn't answer that question.

Q. Showing you now papers marked for identification as Commission's Exhibits 2605-A to E, inclusive; have you ever seen those papers before?

A. No sir.

Q. Do you recall having given any representative of the Federal Trade Commission papers containing the information such as contained in those papers?

A. I am sorry, Mr. Wooden, I don't recall.

Q. Do you have any means for checking by inquiry of your company that would enable you to answer that last question?

A. I don't know.

13977 Q. I am now showing you paper marked for identification 2606. Have you seen that paper before?

A. I don't recall having seen it before.

Q. Do you recall having provided Mr. Johnston, or any representative of the Federal Trade Commission, with that paper?

A. No, sir, I do not, Mr. Wooden.

13978 Q. I am now showing you a paper marked 2607, for identification. Have you seen that paper before?

A. Yes, sir; I seem to recall this paper or this writing.

Q. Is it yours?

A. I believe it is.

Q. What were the circumstances under which you wrote it?

A. Well, it was in answer to a question propounded by someone from the Federal Trade Commission, I believe.

Q. Was that Mr. C. M. Johnston?

A. I don't believe so, Mr. Wooden.

Q. At any rate, you recall having written that?

A. I think that is ours, yes.

Mr. Wooden: I will offer this 2607 at this time.

13981 (COM. EX. 2607 was offered and received in evidence.)

13982 Kansas City, Missouri,
January 18, 1939.

13983 Mr. W. A. Wecker is on the stand.

Mr. Zimmerman: If the Examiner please, I have here the exhibits 2606, 2605-A to E, inclusive, and 2604-A to F, inclusive.

We have made every effort that I know of that would be possible to find any information concerning those exhibits in the Marquette files or to in any wise connect them up with the call of anybody by the name of Johnston, but we are unable to do so.

W de find two typewritten questions and carbon copies of answers in the file, indicating that the document which was offered and received in evidence yesterday did come from files in the office of the Marquette Company, and, we do have, I presume, this question which applies to question No. 1 and question No. 2 and an answer to that, which we would be very glad to produce.

Mr. Wooden: May I see the question No. 1?

13984 Mr. Zimmerman: Yes, sir, you certainly may. They are both on one sheet of paper, and I don't think they are numbered. They are just in one, two order; that is all. (Handing a paper writing to Mr. Wooden.)

I may add that Mr. Wecker can explain the situation that existed at the Marquette offices at that time. There were some peculiar conditions there which would account for some lack of recollection and methodical conduct at that time.

Mr. Wooden: I have no objection to having these questions submitted along with the exhibit No. 2607, although 2607 relates only to the question No. 1.

Mr. Zimmerman: I am not anxious to have them admitted. It doesn't matter to me. I brought them because we promised to find for Mr. Wooden whatever we could that was in that file.

13985 Trial Examiner Norwood: Those are the questions to which 2607 replies?

Mr. Wooden: There are two questions on the sheet. One of them apparently—

Mr. Zimmerman: (Interrupting) There are two questions and two answers, and this Exhibit 2607 seems to be the answer to the first question.

Trial Examiner Norwood: Yes.

Mr. Wooden: That is right.

W. A. WECKER resumed the stand, having been previously sworn, and testified further as follows:

Direct Examination by Mr. Wooden (Continued):

Q. Referring, Mr. Wecker, to Exhibit 2607 for identification, is that your answer made to the first question on the sheet which Mr. Zimmerman has referred to?

A. That seems to be the answer to that question. It ties together.

(The paper writing referred to was marked "Commission's Exhibit 2608" for identification.)

13986 Mr. Wooden: I will offer at this time just that portion of the paper marked 2608, which is the paper Mr. Zimmerman produced, that is contained in the first paragraph thereof. I am not offering the second question, or the second part.

Mr. Zimmerman: Yes, in this: I don't object to the question and the answer going in at all, but I do think that the questions are a part of the same thing, and the answers—both the questions and the answers are inter-related and I can see no reason why they shouldn't both go in as showing whatever they do show as to the facts and circumstances they refer to. I see no reason for

13987 keeping out part of them. They are all pertinent if any of them are.

Mr. Wooden: If that is the answer to question No. 2, I am not offering that, Mr. Zimmerman.

Mr. Zimmerman: I understand that, but I object to question No. 1 and the answer going in unless the whole thing goes in.

Mr. Zimmerman: If one is relevant or pertinent they both are because they are inter-related and both refer to the same subject matter.

Trial Examiner Norwood: If the counsel wants to offer it he may offer it.

13988 (COM. EX. 2608 was offered and received in evidence.)

Trial Examiner Norwood: The counsel is free to offer that, and if he offers it I shall certainly receive it.

Mr. Zimmerman: I think that we should offer on our own behalf the balance of the document which is the question No. 2 and the answer to No. 2, and I will ask that

question No. 2, which is on the document marked for identification as 2608—

Trial Examiner Norwood: (Interrupting) Yes.

Mr. Zimmerman: (Continuing) —be received in evidence.

13989 And, by the way, who ran the pencil mark through that?

Trial Examiner Norwood: I did.

Mr. Zimmerman: I will also ask that the answer to question No. 2 be admitted in evidence now. Mark it in any way that is proper to identify it.

Mr. Wooden: I want to object, Your Honor, to the document containing the witness's unsworn statements because they are, on their face, of a self-serving character. Anything of that sort should be put in through the witness's testimony and subject to cross examination.

Trial Examiner Norwood: Well, I understood,
13990 when I made my remarks on the subject as to receiving them, that this other paper here that is now offered as an answer to question No. 2 was the remainder of the answer to question No. 1. Now it appears that you are offering a different question and a different answer.

Mr. Wooden: That is right.

Mr. Zimmerman: Question No. 1 and question No. 2 were propounded at the same time and they are inter-related, related to the same subject matter. If one is relevant, competent and material the other is, and the answers were made at the same time and all a part of the same transaction. The two questions are upon the same page, even; but the subject matter is all inter-related. If one is competent and relevant so is the other.

13992 Trial Examiner Norwood: I am going to separate this.

Mr. Zimmerman: I object to having it separated. We have a right to have the record show that it was a part of the same document. I don't think Your Honor has any right to destroy a paper or to change a paper as it was produced.

Trial Examiner Norwood: This is a respondents' exhibit?

Mr. Zimmerman: I object, Your Honor, to your doing anything of the sort in tearing that paper.

Trial Examiner Norwood: Counsel is going a little beyond his province in objecting to that, I think.

Mr. Zimmerman:—I don't think Your Honor has any right to make any physical change.

Trial Examiner Norwood: The question No. 2 is received as Respondents' Exhibit No. 84, and the answer thereto is received as Respondents' Exhibit No. 85.

(RESP. EXS. 84 and 85 were offered and received in evidence.)

Mr. Zimmerman: Then let the record show that the Examiner on his own motion tore the paper in twain so that Exhibit No. 2608—and what will this be marked, sir?

13993 Trial Examiner Norwood: Respondents' Exhibit 84.

Mr. Zimmerman: —and Respondents' Exhibit 84 were physically torn apart by him.

By Mr. Wooden:

Q. Mr. Wecker, did you ascertain any more definitely the date of your resignation from The Cement Institute?

A. I think it was in 1938.

Q. 1938?

A. Yes.

Q. What time?

A. Well, the month I don't remember.

Q. What time of the year?

A. Summer.

Q. Summer of 1938?

A. Yes, sir.

Q. Are you aware of the provision of the Institute that a year's notice has to be given before a resignation becomes effective?

A. I don't know that.

Q. I beg your pardon?

A. I don't know anything about that.

13995 Q. Have you ascertained any more definitely, Mr. Wecker, the dates of your various resignations from or departures from the Portland Cement Association?

A. No, sir; you didn't ask me to do that.

Q. Well, I don't believe I asked you specifically. Do you have it in mind any more now than you did before?

A. No.

13996 Q. Will you check the records or information of your own company on that point and let us know?

Mr. Zimmerman: Well, I object to that question. That is not a question, but it is a request.

Mr. Wooden: Yes.

Mr. Zimmerman: Now, I maintain that it is neither competent, relevant or material as to when prior to this witness' knowledge the Marquette Company belonged to some other organization that is not a party to this proceeding at all.

Trial Examiner Norwood: I don't see the relevancy.

Mr. Wooden: Your Honor, that question has arisen before, the question of relevancy of any activities of the Portland Cement Association. It has been shown that the membership has been very largely the same as the membership of the Institute; that is, a very large number of concerns are in both organizations.

Now, in that connection, Your Honor, I direct your attention to Commission's Exhibit 2257, which you received in evidence day before yesterday, a letter from Mr. Sunderland to Mr. Boettcher, August 13, 1931, which shows the subject that was under discussion at that

13997 time.

I also call your attention to Exhibit 2258, for identification, which Your Honor did not receive day before yesterday because of lack of showing of its relevancy, written by the same man on the same day to another party, in which he clearly showed that he is talking about the Portland Cement Association, the membership in it, and membership in it under certain conditions, which are relevant in this case.

So at this time, Your Honor, I reoffer that last numbered paper because of its connection with the other and because of its relationship to the activities of the Portland Cement Association and the activities of that Association to the issues in this case.

13998 Mr. Wooden: I asked the witness a question as to whether he would check and provide the information as to the exact dates of their joining and resigning from the Portland Cement Association.

Mr. Zimmerman: I object to that question.

Trial Examiner Norwood: The respondents object to that, and the objection is overruled.

Mr. Zimmerman: All right.

Trial Examiner Norwood: Answer the question.

Mr. Zimmerman: It is purely a matter of the witness's own pleasure in—

Trial Examiner Norwood: (Interrupting) Off the record.

(A discussion ensued off the record.)

Trial Examiner Norwood: Wait just a minute. Put that in the record. Will you make your statement again, Mr. Zimmerman?

Mr. Zimmerman: I will not.

Trial Examiner Norwood: I hope you will not see fit to make any more statements like that during this hearing.

Mr. Zimmerman: All right, sir.

Trial Examiner Norwood: And I would advise
13999 you not to.

Mr. Zimmerman: Thank you.

Trial Examiner Norwood: Answer that question.

A. What was the question?

Trial Examiner Norwood: Put this on the record. It is the Trial Examiner's recollection that Mr. Zimmerman, counsel for the Marquette Company, advised the witness that he could either answer that question or not, just as he pleased.

Mr. Zimmerman: I didn't say that at all.

Trial Examiner Norwood: What advice did you give?

Mr. Zimmerman: Well, I merely say that I did not so advise him, and I do not now so advise him.

Trial Examiner Norwood: Will you say that advice you gave?

Mr. Zimmerman: No sir.

Trial Examiner Norwood: Go ahead, then.

Read the question.

(Question read by the Reporter.)

A. I will take the matter up with the Portland Cement Association and endeavor to get the information for you, Mr. Wooden.

Q. Mr. Wecker, did you object to the proposals of
14000 the Cement Institute with regard to the price provisions of the N.R.A. Code?

A. Well, we objected to a number of things. I don't know just exactly what you mean about the price provisions. My recollection is none too good.

14001 Q. Referring to 2603-D, a portion of your circular letter that you identified yesterday, referring to

your comments on Article VIII of the proposed Code, does that refresh your recollection as to whether you objected to some of the price provisions of the proposed Code?

Mr. Leisure: I didn't quite hear you, Mr. Wooden. You said the proposed code, did you not?

Mr. Wooden: Yes.

A. Mr. Wooden, what was the point of your question?

By Mr. Wooden:

Q. You will have to determine that from the question itself, I am afraid.

A. In reading it I want to consider,—keep your point in mind.

Q. Whether you did make objection to some of the price provisions of the proposed Code.

14002 Q. First, will you answer the question? Is your
14003 recollection refreshed?

A. That I wrote this?

Q. No.

A. That we made these objections?

Q. That you made objections to some of the price provisions in the proposed Code.

A. These that I have read, yes.

Q. Your recollection is refreshed, is it, Mr. Wecker?

A. That I made these, yes sir.

Q. Did you consider any of the provisions of the proposed Code as restrictive of the independence of the Marquette Company in the making of prices?

A. Well, the Marquette Company had always been independent in its operations up to the time of the Code, and immediately after the Code, when the N.R.A. was declared unconstitutional, we went back to that independence and exercised our own individual judgment, and that is what we are doing today.

Q. During the period of the Code did you have your independence of action restricted?

A. I think we were restrained in our action by some of these things, yes sir.

Mr. McFadden: Pardon me. I object to the question as irrelevant, because I think it is common knowledge that the entire N.R.A. and all the Codes were restrictive.

14004 Mr. Wooden: That is all right. I want to get the effect on this witness's own business.

Trial Examiner Norwood: Read the question.

(The question was read by the Reporter.)

Trial Examiner Norwood: Objection overruled.

Mr. Zimmerman: He has answered.

Mr. Leisure: Before we go ahead may I have one objection to all this material that is now being gone into under the Code?

Trial Examiner Norwood: Yes. Go ahead.

Mr. Leisure: It being under the Code period and under the requirements of law at that time. I object to it being injected into this case.

Mr. Wooden: He answered the question, I believe, Your Honor.

Mr. Zimmerman: Yes, he did.

The Witness: Yes sir.

By Mr. Wooden:

Q. Mr. Wecker, was there a time prior to the N.R.A. Code when the Marquette Company followed a policy of undercutting the delivered prices of other companies?

A. Well, Mr. Wooden, we have always made our own prices as we saw fit to make them.

14005 Q. Well, will you answer the question?

Mr. Paulson: Read it.

(Question read.)

A. You mean by that, was there any time that we sold cement for less than what our competitors were selling it for?

By Mr. Wooden:

Q. No. I mean, if you had a policy to any extent of intentionally undercutting the delivered prices of your competitors.

A. You mean a policy where we would say, "Now, you go out and sell cement in all cases at less than what your competitors are selling it"?

Q. Not in all cases; no, but can't you answer the question as to whether you had any such policy?

A. I said we made our own prices, Mr. Wooden.

Q. Well, you haven't answered the question.

Did you have a policy whereby you intentionally cut under the delivered prices of your competitor?

A. Well, that don't click with me at all. You can have a policy—

Q. You can say yes or no.

A. I don't think I can answer that yes or no.

Trial Examiner Norwood: Did you underbid your competitors in order to get business on any occasion?

The Witness: And not get business?

14006 Trial Examiner Norwood: In order to get business?

The Witness: Oh, in order to get business? I dare say we did.

Trial Examiner Norwood: Don't you know whether you did or not?

The Witness: Yes, I think we did.

Trial Examiner Norwood: Yes.

By Mr. Wooden:

Q. Did you do it intentionally and deliberately?

A. Why, everything we do we do intentionally.

Q. Including that, then?

A. I should think so.

Q. Did you have a policy of undercutting the delivered prices of competitors on large business such as State Highway Commission business?

A. Now, let me say, Mr. Wooden, that we had no policy. I don't understand what you mean by policy.

Q. Well, then, did you have a policy of matching or making your delivered prices the same as your competitors?

A. We always made our own prices, Mr. Wooden.

Q. Did you have any policy of that sort?

A. To make our own prices, yes.

Q. I mean of the sort I asked.

A. Well, I don't—that doesn't seem to make any sense to me.

14007 Q. If you would answer the question, maybe we could get some sense out of the situation.

A. Well, if I can understand the question, I will be glad to answer it.

Q. As I understand your position, you had no policy either way; is that right?

A. Well, I don't know what you mean by policy. We may do one thing today and we may do another tomorrow.

Q. That is true enough, but did you have any policy with regard to whether you during a certain period of time went out to get the business at less than the delivered prices of your competitors?

A. If you mean by that, Mr. Wooden, that we said,

"Now, our policy is to sell cement in all cases or in a great many cases or in the majority of cases," if you please, "at less than our competitors are selling", I would say no.

Q. Well, did you in fact undercut the delivered prices of your competitors on large business such as State Highway business?

A. We have always made our own prices. They may at times have been lower than that of our competitors.

Q. Don't you know that they were?

A. Yes, sir, I do.

Q. Don't you know, that in some cases they were consistently lower?

14008 A. Well, I couldn't say to that.

Q. Or lower at a great many delivery points on a given letting?

A. I suppose so.

Q. You suppose so?

A. Yes.

Q. In other words, you believe so?

A. I believe so.

Q. Did you obtain an increasingly large proportion of the highway business of Illinois over a period of some years beginning, say, in 1929 or '30?

A. Beginning in '29?

Q. Yes.

A. To what date?

Q. Oh, say, down to 1933.

A. An increasing proportion?

Q. Yes.

A. I am sure I don't know.

Q. Do you recall getting Illinois highway business to the extent of 1,500,000 barrels in 1931?

A. No, sir. I remember getting a contract, but I don't remember the amount.

Q. Do you recall getting the Illinois highway business to the extent of 2,500,000 barrels in 1932?

A. No, sir, I don't recall the amount.

14009 Q. Do you recall whether you were the low bidder in 1931 and '32 on Illinois Commission business?

A. I am not so sure about that.

Q. Did you make prices for delivery at various destinations to the Illinois Highway business in 1932 that were lower than they had been in previous years?

A. I believe so, yes.

Q. Do I understand, did you make it a policy to quote the same delivered prices on Highway Commission business that you did to dealers at the same destination?

A. Not necessarily.

Q. How was it as a rule?

A. We didn't have any rule.

Q. You don't have any rule or any policy; is that it?

A. No, sir.

Q. Didn't you have a policy to make the state the same price that you made to dealers?

A. I don't believe so.

Q. Did you sometimes make the dealers a lower price than the state?

A. Well, if my recollection serves me, it would be the other way around.

Q. In other words, then, you did make your delivered prices to the state lower than the delivered prices to dealers at the same destination?

14010 A. Well, Mr. Wooden, I can't say, but I have given you my feeling that we did in some cases, my belief.

Q. When you said "the other way around" that is what you meant?

A. Yes.

Q. Were you aware whether or not the practice in the industry was to make the same delivered price to the states as to dealers?

A. Well, I couldn't say as to that.

Mr. Leisure: I want to object to that.

Mr. Wooden: All right.

Mr. Leisure: There is no question about his own company, and I object to counsel asking him about the industry unless he shows that—

Trial Examiner Norwood: He simply asked him whether he knows it or not, and he can answer it yes or no.

Mr. Leisure: I think there should be some showing that the witness was some officer or—

Trial Examiner Norwood: He said he didn't know.

Mr. Leisure: Oh, excuse me. He answered it. I am sorry.

By Mr. Wooden:

Q. Do you recall something of the course of prices on cement during 1931 and 1932?

14011 A. Only that they were constantly downward.
Q. And they reached a very low point, did they not?
A. I believe so.
Q. How low did they go at your plant at LaSalle?
A. Well, we don't—are you talking about prices?
Q. Yes.
A. Well, we don't have any prices at our plant, Mr. Wooden.
Q. How low did they go on your mill net?
A. Well, you mean by "mill net," Mr. Wooden, that part which is left of the price after you take out what?
Q. The part that is left of the delivered price after you take out the freight and the package and discount.
A. And the discount?
Q. Yes.
A. Now, you are asking me how low it went?
Q. Yes.
A. Well, I can't exactly—I can't give you exact figures on that, but it went pretty low.
Q. Did it go as low as 85 cents?
A. Yes, I think so in a good many cases.
Q. And your mill nets lower than that in some cases?
A. Yes, sir.
Q. How was it at your Cape Girardeau mill?
A. Well, it probably was a little better than that, than it was at LaSalle.
14012 Q. How much better?
A. Oh, I would say probably—well, I am merely guessing now.
Q. Yes.
A. I would say 20 or 25 cents better.
Q. Did any competitor put out prices in 1931 or '32 which figured back to a base at your Cape Girardeau mill?
A. Well, now, I don't understand that kind of talk, Mr. Wooden. I do know that something along the line of what you are speaking of is mentioned in a book brought out by the Federal Trade Commission some time ago.
Q. You haven't answered my question. You don't understand it?
A. No, sir.
14013 Q. I will ask you whether or not the Alpha Company put out delivered prices which after deducting the freight and package and discount, cash discount, figured back to common price at Cape Girardeau?

Mr. Zimmerman: You mean a common net at Cape?

Mr. Wooden: A common figure in dollars and cents. I will put it that way.

The Witness: Quite so.

Mr. Zimmerman: Will you mention the year?

Mr. Wooden: I did before, 1931 and 1932.

A. My recollection, Mr. Wooden, is that the cement companies, I don't know whether it was the Alpha Company or any other, or all of them quoted prices at many times during the period you speak of and—or, I should say, with the idea or with the apparent idea of meeting prices that we had been making.

14014 Q. And meeting them where? Meeting them at Cape Girardeau or meeting them at destination?

A. At the market place.

Q. Well, what do you mean by that?

A. The place where cement is sold.

Q. Well, you mean by that when competitors found that some of your delivered prices were low—

A. (Interrupting) Yes; lower than theirs.

Q. (Continuing) —that they put out prices which made them take that low a mill net on all your business from Cape Girardeau?

A. Oh, I don't mean that at all. All I said was that they put out prices which were apparently trying to meet the prices that we were selling at.

Q. Meet them wherever you sold, is that right?

A. Yes sir.

Q. Wherever you sold?

A. Yes sir.

Q. Not merely at the points where you made them?

A. At the points where we made them?

Q. Not at the destination points where you made them?

A. What is the distinction?

14015 Q. Don't you recognize the distinction, Mr. Wecker, between meeting a low price of yours at one point where you put it in on a particular piece of business and making you take that price wherever you sold at other points?

A. Not necessarily.

Q. You don't see any distinction?

14016 A. No sir.

Q. Well, all right. I will leave it that way.

Now, in July, 1932 did you send out quotations to your

trade which reflected an increase in price of 40 cents a barrel at your LaSalle plant?

A. I seem to recall, Mr. Wooden, that we raised prices at about the time you speak of, but I certainly don't have any recollection of what the amount was, whether it was this 40 cents you speak of.

Q. You have no recollection whether it was from 85 cents to $1.25?

A. Well now, those are not prices you are talking about, Mr. Wooden.

Q. Well, what are they?

A. Well, you are talking about what is left over, aren't you, out of a price made at destination?

Q. You tell me what those figures are, 85 cents and $1.25.

A. You mentioned them. You will have to tell me.

Q. I thought your recollection as to those figures had been refreshed, that that was the increase.

A. No sir. I don't get them. I don't follow that, Mr. Wooden. I am sorry.

Q. You do recollect that there was an advance of somewhere around that figure?

A. No, I shan't say it that way at all because I 14017 don't recall what the amounts were. I recall that we had—

Q (Interrupting) You don't know whether it was 10 cents or 40 cents?

A. No sir, I don't.

Q. And it might have been a dollar for all you know?

A. Yes.

Q. And it might have been 10 cents?

A. Yes.

Q. You have no recollection about an increase of 40 cents a barrel?

A. Not in the way you put it, no sir.

Q. In any way you want to put it did you increase the price 40 cents a barrel, in any way you want to put it?

A. I can't say that we did, no sir.

Q. Well, the record will show it.

A. All right. I am not trying to evade your question, you understand.

Q. Had the Marquette Company shortly prior to July, 1932 taken the business of the Illinois Highway Commission?

A. 1932?
Q. Yes. Some of it.
A. Well, some of it. Did you qualify it to say some of it?
Q. Yes, I qualified it to say some of it.
A. I believe so, yes sir.
14018 Q. What proportion of the capacity of your plant was taken up with Illinois Highway business that year?
A. Well now, Mr. Wooden, you recall that I told you a little while ago that I didn't recall what the amount was, so I can't very well answer that question.
Q. Did your plant run at capacity during 1932?
A. I believe it did.
Trial Examiner Norwood: Five minute recess.
(A short recess was taken.)

By Mr. Wooden:

Q. Mr. Wecker—shall we go ahead?
Trial Examiner Norwood: Go ahead.

By Mr. Wooden:

Q. Mr. Wecker, when you said that your mill ran at capacity during 1932 did you mean both mills?
A. Yes sir, I believe both did.
Q. How large a proportion of the capacity of both mills was taken up with supplying the Highway Commission business?
A. Well now, that seems to be the same question, Mr. Wooden, in a different form. I don't know.
Q. Can't you say whether it was a very large proportion,—major proportion?
A. I don't believe it was the major proportion. You are talking about Illinois now?
Mr. Zimmerman: If the Examiner will permit a
14019 suggestion, Mr. Wooden does have the figures as to the amount that we sold to the State of Illinois in 1932, and he might ask the witness what the capacity of the two mills was at that time, if he knows, and then it would be quite apparent what the proportion was.
Mr. Wooden: Thank you. I will ask that.

By Mr. Wooden:

Q. What was the capacity of the two mills at that time?
A. This is 1929, isn't it?

Q. No. 1932.

Mr. Zimmerman: 1932.

A. 1932, that is right. In 1932 the capacity was our present capacity, and I said yesterday that was 6,600,000 combined.

By Mr. Wooden:

Q. You supplied the Illinois Commission business from both mills?

A. Some of it was shipped from our southern mill, yes, sir.

Q. Did your company take the lead in advancing prices in July, 1932?

A. I believe we did, yes sir.

Q. Was your lead followed almost immediately by other companies?

A. Well, I can't say how soon after, Mr. Wooden.

14020 It was followed. No; perhaps I should qualify that. No, it wasn't followed. Other companies did make lower prices than we quoted at that time.

Q. Did other companies put out announcements almost immediately matching the prices that you advanced?

A. I say I don't recall that it was immediately. I don't remember whether it was or not. I don't believe it was. And also you said matching, and I just got through telling you that my recollection is that they weren't matched in all cases by other companies.

Q. Do you recall whether your announcement of increase was put out on July 16, 1932?

A. I don't recall the date, no, sir.

Q. Do you recall whether other announcements were put out on July 18, making the same delivered prices that you did?

A. I don't recall that; no, sir.

Q. During this time that you had been making lower bids than other companies, was anything ever said to you about it by any of your competitors?

A. Well, now, first of all, you are characterizing our entire conduct, are you, by saying that? Are you inferring in your question that all of your—all of our prices were lower than other companies quoted at destination?

Q. No; such as were lower.

A. Well, I don't believe they were.

14021 Now, what was the point of the question again?

Q. Whether any of your competitors talked to you about your prices being lower?

A. No, sir.

Q. All right. What conditions of supply and demand warranted an increase of anywhere around 40 cents a barrel in July, 1932?

14022 Mr. Wooden: All right. I will delete the reference to 40 cents.

A. Well, now, Mr. Wooden, my recollection is quite hazy about this whole thing. It goes back before I became the executive head of this company. I can recall, however, that this whole thing, this whole story was written up in answer to a question of the Federal Trade Commission and submitted to them. Now, you must have that answer in your files, and it will save a lot of trouble if you will get it out.

By Mr. Wooden:

14023 Q. I want your present recollection on the stand.

A. Well, now, I have lost the question. You will have to read the question.

(The question was read as follows:)

"What conditions of supply and demand warranted an increase in the price of cement in July, 1932?".

A. Well, I don't know.

By Mr. Wooden:

Q. Did you tell Mr. C. M. Johnston, representing the Federal Trade Commission, in 1933, that 85 cents had been quoted at LaSalle by Lehigh?

A. Well, now, first of all, Mr. Wooden, I don't recall this meeting with Mr. Johnston at all; I don't recognize the name; I don't recognize the man. The only thing I seem to hazily recall about that is that along about the time you speak of some Federal Trade Commission man did come into our office and made some inquiries. Whether I saw him or not—even whether I saw him or not, I don't recall.

Q. Do you recall telling Mr. Johnston that when Lehigh made the 85-cent quotation at LaSalle, that you attempted to follow suit?

A. Well,—

14024 Trial Examiner Norwood: You had better wait until another question is asked.

By Mr. Wooden:

Q. Do you recall whether or not, in July, 1932, when you made your announcement of increase in prices, that yours took effect immediately?

A. That I don't recall; no, sir.

Q. Do you recall whether or not other mills in advancing their prices in July, 1932, made them effective 15 days after the announcements?

A. I don't know that.

Q. Do you recall bidding on the Illinois Highway Commission business in 1933?

A. Yes, sir.

14025 Q. Do you recall whether or not all bids were rejected in that year?

A. Yes, sir, they were.

Q. Did Marquette negotiate an arrangement with the Highway Commission by which Marquette got the Highway Commission business for that year?

A. Yes, sir, I recall it did.

Q. I particularly want to know, Mr. Wecker, how your negotiated price compared to the bid prices that you have made and which were rejected.

A. I remember some things about this. I was in it myself. We had protracted conferences with the state officials on the subject, the upshot of which was that we entered into a contract which gave us by the selection of specific points of delivery and prices an amount left 14026 over at our mill after deducting the freight costs to those particular destinations and the freight and the sacks approximately equal to the average of the whole on which we had bid on in the first instances.

Q. And what did that average amount to?

A. I don't remember.

Q. Can't you even approximate it?

A. No, sir.

Q. Was it around $1.10?

A. I would say that it was a good deal more than that.

Q. A good deal more than that?

A. Yes, sir.

Q. As much as a dollar and a quarter?

A. Perhaps. I don't remembe..

Q. You wouldn't think it would be any more than a dollar and a quarter?

A. It might have been. It might have been.

Q. It might have been a dollar and a half?
A. It might have been a dollar and a half in some cases, yes. I am not certain.
14027 Q. Well, I am talking about your average.
A. Oh, the average. Oh, no, no. I dare say no; no, sir.
Q. What was the average?
A. Well, I don't recall what the average was.
Q. Was that about $1.10?
A. No, sir.
Q. More or less?
A. More than that.
Q. Did you get the entire highway requirements for that year?
A. I believe we did, yes, sir.
Mr. Zimmerman: May I interrupt just a moment? I did not hear that figure. More than what was it?
Mr. Wooden: More than $1.10.
Mr. Zimmerman: Thank you.

By Mr. Wooden:

Q. Did your mill or mills run to capacity that year?
A. No, sir.
Q. What proportion of capacity, percent of capacity did they run?
A. It seems to me we shipped a little over 4,000,000 barrels of cement that year.
Q. Did you produce around two-thirds of capacity that year?
A. Well, that is around about what it would fig-
14028 ure, wouldn't it?
Q. Now, after attending that State Highway Commission business for 1933 did you increase your commercial prices?
A. Well, by commercial prices you simply mean our prices, don't you?
Q. I thought you had different prices for commercial business than for State business.
A. Well, we sometimes do and—we sometimes did and we sometimes didn't.
Mr. Zimmerman: Excuse me, Mr. Wooden. If you will keep your voice up a little bit, Mr. Wecker. The acoustics in here are extremely bad.
Trial Examiner Norwood: Speak up.
A. I am sorry.

By Mr. Wooden:

Q. Can you say whether or not you increased your commercial prices or any prices after getting that highway business in 1933?

A. I think—yes, we raised our prices, yes, sir.

Q. How much?

A. That I don't recall.

Q. Were they raised as much as 25 cents a barrel?

A. It seems that is about it, yes.

Q. About it?

A. Yes, sir.

14029 Q. Did the Marquette Company have some of the State Highway Commission business shipped by other companies?

A. In Illinois?

Q. In 1933. Yes.

A. There were occasions, Mr. Wooden, when we were unable to ship that we asked some other company to ship for us, or turned the business over to them or asked them if they wanted the business.

Mr. Zimmerman: Is this confined to any particular year, please?

Mr. Wooden: 1933.

Mr. Zimmerman: All right. Thank you.

By Mr. Wooden:

Q. Illinois Highway Commission business?

A. Yes, sir.

Q. How many other companies did such shipping for you?

A. Well, that I don't recall. Two, three,—I don't know.

Q. What were they? Who were they?

A. Well, my memory is hazy about that, too. I believe the Universal-Atlas Company, the Dewey Company—that is all I recall.

Q. Did the Hawkeye Company do any of it?

A. I seem to recall that they might have, yes, sir. I am not positive about that.

Q. Approximately how much all told was ship-

14030 ped for you on the Illinois Highway business of 1933 by other companies?

A. Now, that I don't recall. I am sure it wasn't a great deal.

Q. Was it as much as 100,000 barrels?

A. I would be crowding my memory if I tried to say it was.

Q. What were the arrangements that you made with these other companies about shipping that business for you?

A. That I don't remember.

Q. Did you approach them to do it or did they approach you?

A. Oh, yes, we approached them, of course. We couldn't ship, Mr. Wooden, and we had a contract to deliver.

Q. What determined the locations of the points that you had them do the shipping and that you didn't ship?

A. Well, if we couldn't ship everything, why, we tried to get the competitor to ship that which was the least attractive or desirable to us.

Q. And more attractive to them?

A. Not necessarily.

Q. Well, you mean by that, don't you, Mr. Wecker, that you had them ship to the locations where your mill net was not satisfactory, don't you?

A. Yes, where the price at that particular point left the lesser amount after deducting the cost of freight and sacks.

Q. That mill net was not satisfactory, compared to your costs, or what?

14031 A. No; where it was simply less than others.

Q. Well, you have mill nets frequently that are less than others and still fairly satisfactory, don't you?

A. Of course; but if we have to give up some business we would naturally give up that which—

Q. (Interrupting) Is least profitable?

A. Yes; of course.

Q. And it might be more profitable to somebody else to do the shipping than you in that particular instance?

A. Well, I don't know. It might have been, yes.

Q. In general, where were the locations of what Universal-Atlas shipped for you?

A. Oh, now, that is taxing my memory.

Q. Don't you know what part of the State?

A. No, sir; I can't tell you that.

Q. Don't you know what part of the State Dewey shipped for you?

A. No, sir.

Q. Were those shipments made in bags or in bulk?

A. Well, I am merely guessing when I say that I think they were in bags.

Q. Your bags?

A. No, sir.

Q. How was it handled—how was the settlement or the payment for such shipments handled?

A. Well, now, that I don't exactly recall, Mr.
14032 Wooden. We might have asked these companies to bill us and then we, in turn, billed the State for the amount for the cement and collected direct from them under our contract, or we might have asked the State if it wouldn't be satisfactory if the company billed direct under our contract price.

Q. Did you have a contract with the other companies or an exchange of correspondence, or what?

A. I don't believe so.

Q. You don't believe so. Anything in writing about it?

A. I don't believe so. There might have been, but I don't know.

Q. Were there any other companies that shipped for you on that contract, on that Illinois business, I mean?

A. I have mentioned, I think, Universal-Atlas, haven't I?

Q. Yes.

A. And Dewey?

Q. Yes.

A. I don't recall any others. You said Hawkeye and I said I seemed to have a hazy recollection that they might have.

Q. How about Louisville Cement Company?

A. Oh, yes, I seem to have a recollection that they might have shipped some.

Q. How about Kosmos?

14033 A. No. That doesn't strike a responsive chord.

Q. Did Alpha or Lehigh ship any on that Illinois business?

A. Well, my guess is they didn't, Mr. Wooden.

Q. Mr. Wecker, will you provide a statement which will show the companies and mills which shipped for you on that Illinois Highway Commission business of 1933, the amounts shipped and the locations of destinations to which shipped?

Mr. Zimmerman: Well, I would have no objection to doing that so far as the records of our company discloses, certainly.

Mr. Wooden: Well, of course.

Mr. Zimmerman: That is as far as you wanted us to go, wasn't it?

Mr. Wooden: Yes.

Mr. Zimmerman: I wouldn't want to undertake to go into the records of any other company.

The Witness: That is what I was going to say.

Mr. Zimmerman: Yes. I would be very happy to.

Mr. MacIntyre: Off the record.

(A discussion ensued off the record.)

By Mr. Wooden:

Q. How was the matter of price handled in those shipments by other companies? Did they just take over the same destination price obligation that you had assumed in the first place?

14034 A. Yes.

Q. As far as the State was concerned, why, the destination cost to the State was the same as before?

A. Yes.

Q. Did you make any report to any agency in the industry concerning the shipments by other mills for your company in 1933?

A. No sir.

Q. Has the Marquette Company ever shipped for other mills under—well, ever shipped for other mills?

A. I don't believe so.

Q. Mr. Wecker, has your company subscribed for the freight rate books of The Cement Institute?

A. No, sir; never have.

Q. What sort of freight compilations or records do you use in the pricing of your cement?

Mr. Zimmerman: Do you want to see one? I sent for one last night.

A. Well, we use the published tariffs of the different railroads as basic material from which we prepare statements of freight rates to all destination points where we want to sell, from all of the different mills which we are likely to compete with.

(A bound volume of paper writings was handed to Mr. Wooden by Mr. Zimmerman.)

14035 Mr. Zimmerman: Off the record.

Trial Examiner Norwood: Off the record.

(A discussion ensued off the record.)

Trial Examiner Norwood: On the record.

By Mr. Wooden:

Q. Have you made any check or comparison between your freight rate compilations and the freight rate books of The Cement Institute?

A. No, sir.

Q. Why is it as a member of The Institute that you have not used the freight rate books of The Institute?

A. Well, we are not members of The Institute.

Q. Well, you were?

A. Yes.

Q. Yes; during the time you were a member.

A. Well, the simple answer is that we prefer to do it ourselves.

Q. Well, now, that is no answer. Why do you prefer to do it yourselves? That was my question in the first place.

A. Why do we prefer to do it ourselves?

Q. Yes.

A. Well, must there be any particular reason for preferring to do it ourselves?

Q. Don't you have a reason for doing things in your business?

A. As a general rule, sure.

14036 Q. What was the reason in that instance?

A. I don't know that we have any particular reason.

Q. Oh, you don't have any. All right. Let it go.

Trial Examiner Norwood: Do any of your force compare the rate books you use with the rate books of The Institute?

The Witness: Are you addressing me, Mr. Examiner?

Trial Examiner Norwood: Yes. Read the question.

(Question read.)

The Witness: I think I answered the question that they did not.

Trial Examiner Norwood: No, he asked you if you did.

The Witness: Oh, if I did.

Mr. Zimmerman: I think he understood that to mean the company.

Trial Examiner Norwood: Do you know whether any of your people made that comparison?

The Witness: I am sorry, sir. I am sure that there would be no occasion for it.

Trial Examiner Norwood: Do you know whether they referred to The Institute rate book in preparing this book?

The Witness: Oh, I am certain they didn't.

14037 The witness identified Com. Ex. 2609 as a freight rate book prepared by Marquette's Traffic Department showing rates of freight to all destinations in Illinois from a number of different cement plants. The books are used in calculating Marquette's delivered prices and Marquette has similar books for other states.

14038 The Witness: This freight rate book seems to be up to date to November 26, 1937.

Mr. Wooden: I will offer this 2609.

Trial Examiner Norwood: Any objection?

Mr. Zimmerman: I have no objection.

By Mr. Wooden:

Q. Mr. Wecker, the only mills of your company, I understand, are at LaSalle or Oglesby, and Cape Girardeau?

14039 Mr. Zimmerman: Well, you don't mean there are three mills. There are only two, LaSalle and Oglesby being the same thing.

Mr. Wooden: Yes, I understand.

By Mr. Wooden:

Q. You say your mills are located only at LaSalle or Oglesby, as the case may be, and Cape Girardeau?

A. Yes, sir.

Q. Cape Girardeau is sometimes called Marquette?

A. Yes, sir.

Q. Will you explain why it is that in this Illinois rate book of your company, Exhibit 2609, you have the rates figured from a number of mills that are not your own?

A. We think it is a necessary part of our business to be informed as to what it costs the other cement companies to get their cement to destination.

Q. In order that you may get their price at destination?

A. Well, not altogether, Mr. Wooden.

Q. What else, then?

A. It may give us an indication some time whether or not the—whether or not a company is likely to make a

price as low as we might be contemplating, or something like that, as an aid to sale, as an aid to determining what we want to do under the circumstances.

Q. You have to know what their price less
14040 freight is as well as the freight, don't you, in order to know what their delivered price is?

A. I don't get that.

14041 A. Well, now, you mean by that, Mr. Wooden, what is left after one deducts freight and sacks?

Q. Yes.

A. At where they happen to be shipping from?

Q. Yes.

Q. Mr. Wecker, you said you have in this book the freight rates from various mills, the location of various mills where you do not have mills?

A. That is right.

Q. That you use this book in making up your delivered prices.

I am asking you whether you don't have to have what is left from the delivered price after deducting freight and package and discount in order to know what the delivered prices at all these destinations are.

14042 A. Yes.

Now, Mr. Wooden, when I answered your question before as to whether or not they used this book to make our delivered prices, and said yes, I meant that we had to have that information—we had to have the amount of freight to the destination point or what it would cost us to haul the freight, haul the cement to the point where we use or where we sell the cement to add to a uniform remainder which we would establish as being an element in the price we make.

Q. All right. You use that term "element".

Mr. Zimmerman: I still don't think he has answered your question.

By Mr. Wooden:

Q. That uniform remainder that you speak of is what you find remaining at the plants of these—indicated by the headings in these compilations?

A. Oh, no; I didn't say that, Mr. Wooden. I said at our plants.

Q. Why do you have their plants in there if you don't need them for figuring any delivered prices?

A. I said a little while ago that we use that information a great number of times to determine what a competitor is likely to do.

Q. Likely to charge at a given destination?

14043 A. Yes; whether he is likely to reduce a price that we may have in mind, or be able to quote a lower one.

(The paper writings referred to were marked "Commission's Exhibit 2610-A, B and C" for identification.)

By Mr. Wooden:

Q. Mr. Wecker, I am showing you papers marked for identification as 2610-A, B and C. Is that your signature at the bottom of 2610-C?

A. Yes sir.

Q. Do you recall, Mr. Wecker, the circumstances regarding your declination, or your company's declination to furnish certain statistical data to the Institute any longer?

A. Yes sir.

Q. What were the reasons that you declined to furnish statistical data any longer?

A. Well, as I recall, Mr. Wooden, we wrote a letter or letters to the Cement Institute at that time in which we enumerated all of our reasons in detail. I can't recall them.

Q. You can't state now what the reasons were?

A. No.

Q. What was the character of the statistics to which you objected?

A. Well now, as I recall it, we objected to a number of different kinds of,—kind of statistics.

14044 Q. All right. Specify.

A. Well, I don't remember all of them.

Q. Specify what you can remember.

A. All right. The supplying of information, I believe monthly, on the shipments from our mills, our production and our stocks on hand.

Q. What was there objectionable in that as you saw it?

A. Well, we have always taken the—always been of the opinion that that was our own private information and that we didn't want it bandied about, or that we didn't want any other competitor to have it.

Q. Did you see any danger to your company in other competitors having it?

A. No, I can't say that I saw any particular danger in it, Mr. Wooden.

Q. Not even potential danger?

A. Well, I don't know.

By Trial Examiner Norwood:

Q. Trade disadvantage?

A. Oh, I can't say as to that. We simply took the position that we didn't want our competitors to know what our shipments were.

By Mr. Wooden:

Q. And was that based on any thought of disadvantage to your company?

14045 A. Nothing specific, no sir.

Mr. Wooden: Just a moment, Your Honor. I think I am through. I am nearly through, anyway.

Trial Examiner Norwood: All right.

By Mr. Wooden:

Q. Mr. Wecker, during 1933, when some of your highway commission business, Illinois Highway Commission business was being shipped by other companies, did any companies ship other business for you during that time?

A. Now, I don't recall, Mr. Wooden.

Q. If they did will you include that in your statement which I understand you have agreed to prepare?

A. I will make that search, yes sir.

Q. Did other companies ship for Marquette during years other than 1933?

A. I seem to recall they did, yes sir.

Q. When?

A. Well, it must have been prior to 1933.

Q. Nothing subsequent?

A. No sir.

Q. Was it done during 1932?

A. Possibly.

Q. How about 1931?

A. Possibly.

Q. Well then, will you cover other years?

14046 A. All right, sir.

Q. As well as 1933, in the statement?

A. I will make the search, yes sir.

Q. All other years?

A. Yes sir.

14049 *Cross-Examination by Mr. Zimmerman.*

Q. Mr. Wecker, how long has Marquette had its own traffic department?

A. Ever since I can remember.

Q. Well, that goes back—

A. (Interrupting) 25 years.

Q. And that traffic department has been main-
14050 tained at all times up to the present time?

A. Yes sir.

Q. There was no curtainment of the operations of your traffic department during any period in the last 25 years?

A. No what?

Q. No curtailment of its operations?

A. No sir.

14052 Q. The Respondents' Exhibit 86-B shows the date of the memorandum, Respondents' Exhibit 86-A, does it not, Mr. Wecker, September, 1933?

A. Yes, that was the one that went out.

Q. It all refers to the Illinois highway contract?

A. Yes, sir.

Mr. Zimmerman: We will offer this in evidence as Respondents' Exhibit 86-A and B, if the Examiner please.

Mr. Wooden: I will not make any objection, your Honor.

Trial Examiner Norwood: Received as marked.

Q. Mr. Wecker, during the noon recess did you refresh your recollection as to the obligation that Marquette entered into with the state in addition to the contract
14053 for 2,000,000 barrels?

A. I did, sir.

Q. Sate what that was?

A. It was an option on the part of the state to take from us as much of an additional million barrels of cement as we could supply and ship during the remainder of the year, as I recall it.

Q. So that that was in addition to the 2,000,000 barrels of the absolute agreement that you had entered into to deliver, not less than 2,000,000 barrels?

A. In addition to the 2,000,000 barrels.

Q. Yes. And your total shipments to the state for that year were how much?

A. I think a little under 2,400,000 barrels.

Q. Now, will you just explain what the situation was as to why you were unable to ship the full amount that

the state desired for that year? Just describe what the picture was as you started that year and your production schedules and all about it so that we can see that picture.

A. Well, we shipped to the extent that it was possible to ship. When we had no more cement we couldn't ship.

14054 Well, now, when we started out this year, 1933, that we are speaking of—

Q. Yes.

A. —we had a certain amount of business on our books unshipped. As I recall it, it was around 2,000,000 barrels. We saw no prospect of adding very much business during the year with the exception of some portion of this business from the State of Illinois. I forget just what we had in mind at that time as to what that portion might be. But with those prospects in mind, we reduced our operating schedules. We had to do it because our storage capacity was limited, and we were even then on the point of filling them.

Q. May I ask, when you say you reduced it, by that you mean you shut down your operations?

A. I don't recall exactly how we did it, but we did during some period shut down completely. We got into this fight with the State of Illinois, and that thing dragged along until about July 1, the end of June, 1933, at which time we negotiated this contract we have been referring to here.

When we negotiated that contract, we fixed the total amount we would be obligated to ship by the total amount of cement we thought we would have available and be able to make from that point on in order to fill that contract.

Q. Which had to be done before the close of the year, as I understand it? It all had to be done before the

14055 close of the year?

A. Well, yes, sir.

A. We figured that amount to be 2,000,000 barrels of cement, and that was the amount of our contract.

We started up our plants at full capacity there and then, and we were hard pressed to keep abreast of the demands of the state at all times during that period. They took more cement than we had agreed to furnish. We let them take it to our ability to supply it, and then as we approached the end of this 2,000,000 barrels, we saw some possibility of supplying some more and that resulted in the negotiation of this option I speak of.

14057 Q. What did you have in mind by that statement, Mr. Wecker, when you responded that the capacity of your mills at that time was 6,600,000 barrels?

A. The amount of cement we could make in one full year's time, running every day.

Q. All right. But what would you have to do in order to do that? What would you have to know in advance?

A. In order to run our plants at that rate?

Q. Yes.

A. Why, we would have to know that we had some possibility of shipping 6,600,000 barrels.

Q. Could you have started in mid-year and manufactured that much?

A. No sir.

Q. When would you have had to start your program in order to possibly be able to make that much?

14058 A. On January 1st.

Q. And then work them at top capacity all during that period?

A. Yes sir.

Q. Now, Mr. Wecker, you stated this morning that it was your recollection that in the year 1933, in connection with the Illinois State contract, that you had gone to some other companies and asked them to ship some part of that. I ask you now whether you have investigated and refreshed your recollection as to whether any part of the 2,000,000 barrels was shipped by any other company?

A. I have refreshed my recollection on that and I now find that no part of the 2,000,000 barrels was shipped by anyone else for us.

Q. Were you or were you not requested by the State of Illinois to take any action with reference to endeavoring to get for them cement shipped by some other companies in addition to all you were able to furnish?

A. Yes, sir.

Q. And is that what perhaps caused you to recall that some cement had been shipped by other companies?

A. That is right, sir.

Q. You have no means of knowing, have you, as to how much cement other companies did ship in addition to the 2,333,000 barrels that you shipped?

A. No, I don't.

14059 Q. Mr. Wecker, were you at any time, or was any officer, employee or representative of Mar-

quette Cement Manufacturing Company a member of the Code Authority?

14060 A. No sir.

Q. Or a trustee of the Cement Institute?

A. No sir.

Q. Or an officer or a member of any committee of the Institute or Code authority?

A. Not that I recall, no sir.

14061 Q. Did you have other criticisms and complaints that were made of the Code presented by Marquette in writing?

A. Yes sir.

Mr. Zimmerman: Will you mark these two exhibits, please?

(A book and paper writings referred to were marked as "Respondents' Exhibits 87 and 88-A to N, inclusive" for identification.)

By Mr. Zimmerman:

Q. Calling your attention first, Mr. Wecker, to the document which has been marked for identification Respondents' Exhibit 87, state whether or not that is an additional complaint or criticism made by Marquette and filed by Marquette with National Recovery Administration and with the Code Authority of the Cement industry for use at the public hearing in September, 1933?

Mr. McFadden: Pardon me, Mr. Zimmerman. Was there a Code Authority at that date?

Mr. Zimmerman: I don't know, sir. I may be
14062 mistaken about it. We will strike that out of the question, because I wouldn't know.

Mr. McFadden: This complaint refers to a proposed code, doesn't it?

Mr. Zimmerman: Yes, it does.

The Witness: It is.

14063 Q. And as to Respondents' Exhibit 88, which is also bound, if the Examiner please, was that filed with General Hugh S. Johnson as an additional criticism and complaint and petition for modification of the Cement Code under date of January 13, 1934?

A. It is.

Q. You were asked this morning, I believe, Mr. Wecker, about the matter of sending statistical information to the Cement Institute, and as to your reasons and the action you took in that regard. State whether or not you did, in

August 1938, also decline to send the information with reference to your shipments and stock on hand not only to the Cement Institute but to the Bureau of Mines?

A. I seem to recall we did refuse it.

Q. Now, did you have any particular reason for that refusal?

A. Yes, I seem to recall we did.

Q. Can you recall any detail of that all? If so, tell us your best recollection.

A. As I recall it, we felt that if we were the only company who was refusing to supply information on shipments, of stocks and production to the Cement Institute, and that we then furnished it to the Bureau of Mines, everybody could by the process of deductions find out what our shipments were, so we wouldn't have accomplished anything.

14064 Q. Was that position which you then took in any wise different from the position which you had taken always as to your objection to such information being exposed to your competitors?

A. Yes.

Q. You say it was any different?

A. It wasn't any different; no, sir.

Q. Do you recall when you first called attention to your position in that regard publicly; that is to say, in any wise so that it was public during your administraton of the affairs of Marquette?

A. I don't recall it.

Q. Well, for the purposes of refreshing you recollection, will you please look at Commission's Exhibit 2603, page B, under the title "Article 4"? Then when you read that, Mr. Weeker, you may refer to the first page so as to get the date.

A. Yes, sir.

Q. Does that refresh your recollection as to when you took that position?

A. Yes, sir.

Q. And announced it openly?

A. This was in August, 1933.

Q. And was that the same position that you took subsequently with reference to furnishing such information.

14065 A. Yes, sir.

Q. You did continue to furnish that information,

however, under the provisions of the code during the time that the code was in existence, did you not?

A. I believe so.

Q. In compliance with the code?

A. Yes, sir.

Q. And for some short period thereafter?

A. I think so.

Q. Mr. Wecker, will you state why you continued to remain a member of The Institute after the decision in the Schechter case and the announcement of the President discontinuing codes in June, 1935?

A. Well, as I recall that, Mr. Zimmerman, there was a good deal of talk at that time of new codes, new
14066 regulatory measures by government, and so initially we stayed in the Cement Institute figuring that we were in it and we would be in a position thereby to protect our interests should any such thing arise.

Now, there has already been received in evidence as Commission's Exhibit 1025-C, a letter which you wrote to The Institute in July, 1936, and 1025-F, which you wrote or which was a reply to you under date of July 10, and a letter, 1025-G and H, which you wrote July 17, 1936, a letter of August 1, 1936, addressed to The Cement
14067 Institute, 1025-J, your letter to Mr. Storey, September 9, 1936, which is 1025-L, and I will ask you whether or not, all those having to do with your refusal to furnish further information with reference to statistics, as therein shown, did you have any further communication from The Cement Institute offices requesting further information in that regard?

A. I seem to recall, yes.

Q. Well, for the purpose of refreshing your recollection, suppose you look at Respondents' Exhibit 89, and state whether that is the communication that you had in mind, and 90, as to your reply.

A. Yes, sir.

14068 Q. Did you after that at any time, Mr. Wecker, or at any time after your refusal in August, 1936 to send any further statistical information to the Institute, send them any such information?

A. No sir.

Q. And what happened, if anything, with reference to the receipt by you of any further statistical information from the Institute after you refused to send that in?

14069 I mean statistics of the nature such as you refused to send in.

A. We didn't get any more.

Q. You were just taken off the list?

A. Apparently.

Q. Did you ever receive any proposition from the Institute as suggested in your letter of December 31, 1936, Respondents' Exhibit 90, as to payment of dues on any basis other than the basis of your per barrel shipments?

A. No sir; I recall none.

Q. And did you ever after that time receive any statement or bill for dues so based from the Institute?

A. No sir.

14072 Q. Mr. Wecker, you were asked this morning about—or, sometime during your direct examination, about whether or not you had any recollection of certain conversations and giving certain information to a 14073 representative of the Trade Commission named Johnston who was supposed to have called upon you —on what date was it, please?

Mr. Wooden: July, 1933. I don't know the exact date.

Mr. Zimmerman: You have got those dates there.

Mr. Wooden: Several dates.

Mr. Zimmerman: Let me have the date from those exhibits.

Mr. Wooden: July 10 was one date.

Mr. Zimmerman: I believe it was July 12, Mr. Wooden.

Mr. Engelhardt: That is the date on one of them anyhow. There are several.

Mr. Wooden: July 10 is one of them.

14074 Q. What, if anything, had happened near that time that created any particular situation in the office of Marquette which could account for your failure to recollect that?

A. The period in question, Mr. Zimmerman, was one of great stress in our organiation because the President of our company, who had been our President for a great many years, had died on July 2, 1933. Our entire organization was quite upset; I was quite upset, and I had many, many matters on my mind that were more vital to me and to the organization than anything from the outside, and to the best of my knowledge that accounts for my lack of recollection of this particular affair.

Q. May I ask you, Mr. Wecker, when, if you can give us the date, you were elected president of the company?

A. On July 24, 1933.

Q. So that that period from Mr. Dickinson's death July 2, up to that date, what would you say of it?

A. It was one of great stress and turmoil.

Q. Now, you were asked this morning with reference to why you didn't use the freight rate book of the Institute. May I ask, Mr. Wecker, how long your company has been making its own freight rate book? I asked you about how long you had conducted your traffic department, but how long had you been making up your own freight rate books?

A. Well, ever since I can remember, which is 25 years.

14075 Q. Had you, therefore, found those books sufficient for your purposes, that is, your own books?

A. Quite.

Q. You were asked about your Cape Girardeau plant, about some prices that were made in the marketing area served by that plant some time in the early 30's by competitors.

14076 Were the prices that were quoted by your competitor or competitors the same as, higher, or altogether lower than the prices then being quoted by Marquette at any time during that period?

A. Well, as I seem to—as I recall, Mr. Zimmerman, none were lower, and some might have been higher.

Q. Well, by that you mean that in some parts of that marketing area, the prices quoted by your competitors may have been higher than in those same destinations that Marquette was quoting?

A. I would say that that is my general recollection.

Q. You were asked also about the custom of Marquette with reference to making lower prices than its competitors in order to get business sometimes. Has there ever been a time when Marquette ceased to do that or refrained from doing it, to your knowledge?

A. No, sir; no, sir.

Q. That, however, was effected to some extent, as you said this morning, that you were limited somewhat by the code during that code period? During the code period under the code, you were compelled to file your prices and to adhere to certain periods of time and certain methods of change, were you not?

A. Yes, sir.

14077 *Redirect Examination by Mr. Wooden.*

Q. Mr. Wecker, how many clerks or employees do you have in your traffic department?

A. Oh, I would say five or six.

Q. How many freight rate men do you have, those who are skilled with the reading of tariffs, the interpretation of tariffs?

A. I would say at least two or three.

Q. Do you see how the use of The Institute freight rate books would give you any saving in the maintenance of your traffic department?

A. Well, I never could see it particularly in our organization.

14078 Q. Referring to Respondents' Exhibit 86-A, Mr. Wecker, do you know who the unscrupulous persons were that circulated the malicious rumors that you refer to there about your shipments, or the ability to make shipments, rather?

A. Well, now, that probably covers a lot of people, a lot of different kinds of people. We heard this—these sort of stories from our customers; dealers and contractors, and everybody under the sun. Who initiated them, I don't know.

14079 Q. Do you know whether or not any competitors issued or circulated such rumors?

A. I couldn't say as to that Mr. Wooden.

Q. Can you name any persons who circulated any such rumors about your failure to make deliveries on the Illinois Highway contract?

A. No sir, because I never had any of those direct.

Q. I didn't understand this explanation of yours about the 2,000,00 barrels that were unshipped at the beginning of 1933 and thereupon you had shipments made by other companies.

Mr. Zimmerman: No; he didn't say that.

Mr. Wooden: That is what I want to get straightened out.

Mr. Zimmerman: Well, ask him the question. But, he didn't say that.

By Mr. Wooden:

Q. Let me ask this question: What business in 1933 was it that the other companies you named this morning shipped for the Marquette Company?

A. In 1933?

Q. Yes.

A. Mr. Wooden, it seems that I was in error in having said that. On checking my records—or, in checking with our office. I discover that that was not the case in 1933.

14080 Q. Do you find that it was the case at some other time?

A. I didn't go back. You have asked me to do that.

Q. Yes.

A. Yes sir.

Q. You didn't at the same time find whether or not the shipments were made in some other years?

A. No sir.

Mr. Zimmerman: Your questions were confined to 1933, you recall.

Mr. Wooden: No.

Mr. Zimmerman: Yes, they were, sir. We looked in the record specifically to inquire.

Mr. Wooden: I asked him if there weren't other years and he said yes.

Mr. Zimmerman: No, no; I don't think so, sir.

Trial Examiner Norwood: Take a five minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Go ahead, Mr. Wooden.

By Mr. Wooden:

Q. Mr. Wecker, did you furnish the Institute during any time with any information regarding land grant rates?

A. Not that I know of, Mr. Wooden.

Q. Did you receive from the Institute any information regarding land grant rates?

14081 Mr. Zimmerman: That is not proper redirect, if the Examiner please. Neither he not I went into land grant rates.

Mr. Wooden: Freight rates. Land-grant rates are a part of the subject of rates.

Mr. Zimmerman: I didn't go into rates at all except to call attention to the freight rates—

Trial Examiner Norwood: (Interrupting) I will let him answer that.

The Witness: What was the question?

(The question was read by the Reporter.)

A. The same answer: not that I know of.

14082 By Mr. Wooden:

Q. When was it, Mr. Wecker, that you said that competitors of Marquette had prices out that were higher than Marquette's prices?

Mr. Zimmerman: I didn't hear that question.

Trial Examiner Norwood: Read it.

(Question read.)

A. As I recall it, Mr. Wooden, that came up in connection with these prices back in 1930 around Cape Girardeau, Missouri, which you asked about.

Mr. Zimmerman: He asked about 1931 and '32, Mr. Wecker.

Mr. Wooden: Yes.

The Witness: Well, I don't recall the date.

By Mr. Wooden:

Q. Do you mean that competitors had delivered prices at given destination points out that were higher than Marquette's delivered prices at the same destination and at the same time?

A. That is my recollection, Mr. Wooden.

Q. Over how long a period of time did that condition exist?

A. Oh, that I couldn't answer.

Q. Well, was it a matter of a few days or a week or a month or what?

A. I don't know.

Q. You haven't the slightest idea of what length of time it was?

14083 A. No.

Q. Have you found it possible for higher delivered prices to be made at the same time as lower ones?

A. Yes, that happens.

Q. You don't have to have identical delivered prices at the same time; is that right?

A. Well, now, what do you mean by we don't have to have?

Q. Well, I mean, it isn't inevitable that you have identical delivered prices at the same time for different mills?

A. Well, in speaking for Marquette, if we want to sell any business, we have generally found that we must have a price at least as low as our competitors.

Q. Or lower?

A. Sometimes they are lower.

Q. You don't consider it inevitable, then, that destination prices be all the same at all times?

A. Well, if one wants to do business, one's price must be at least as low as one's competitors.

Q. You mean to say that to do business the destination prices must be all the same?

Mr. Zimmerman: May I have that question read?

(Question read.)

Mr. Zimmerman: That isn't what he said, sir. It is quite clear that nothing he said can be so construed.

Mr. Wooden: I am asking him if that is what he
14084 means.

Trial Examiner Norwood: Well, let him answer. Objection overruled.

The Witness: Well, now, let's have that again. I don't seem to understand it.

Trial Examiner Norwood: Read it.

(Question read.)

Mr. Leisure: If Your Honor please—

Trial Examiner Norwood: Did you ever say anything like that?

The Witness: I don't think I did.

Mr. Wooden: Well, I don't think you did, either. I am asking you—

Mr. Zimmerman: Then I will object to the question; if he said nothing like that, how could it be fair to ask him if that is what he meant. I think it only fair to presume that the witness is sufficiently intelligent and honest to say what he means.

Mr. Wooden: He says, Your Honor, that prices—sometimes his own prices were less at delivered points than others.

Mr. Zimmerman: That is right.

Trial Examiner Norwood: He says he didn't say anything like that.

Mr. Wooden: Oh, I think he did.

14085 Mr. Wooden: Oh, I think he did.

Mr. Zimmerman: Nothing like what Mr. Wooden's question implies.

Mr. Wooden: Oh, I think he said that.

Trial Examiner Norwood: Objection sustained.

14086 By Mr. Wooden:

Q. I believe you said in response to Mr. Zimmerman's question that you had never hesitated to make lower destination prices than competitors?

A. I don't believe I exactly implied that, Mr. Wooden.

Q. Well, what did you say on that particular point? That is the way I noted it down at the time.

A. I think what I said is that the Marquette Company frequently makes prices lower than its competitors.

Q. You didn't do it on the 1933 bidding of the State of Illinois Highway Commission business, did you?

A. I believe not, sir.

Q. Can you point out any cases where, since 1933 you have made lower destination prices to State Highway Commissions than your competitors?

A. We might have. I don't recall of any.

14087 *Recross Examination by Mr. Zimmerman.*

Q. State whether or not, Mr. Wecker, to your knowledge and since you have been in charge of the affairs of Marquette as its President you have always been free to quote a lower price than a competitor without notice to anyone else except for that period during the Code?

A. Of course.

By Mr. Leisure:

Q. In 1931 and 1932, Mr. Wecker, which you have been discussing with Mr. Wooden, when competitors had prices out that were higher than your prices at the same destinations do you know whether those competitors got any business?

A. I am sure they didn't.

14088 Mr. Conaghan: Yes, Mr. Wooden. I have those documents here.

Your Honor, I am handing to Mr. Wooden a series of exhibits numbered 2268 to 2358, inclusive.

Those exhibits were handed to counsel for Universal-Atlas at Chicago.

Trial Examiner Norwood: Yes.

Mr. Conaghan: On January 11, 1939, for the purpose of comparing them with originals which we had in our files.

That comparison has been made and we have 14089 found that the exhibits which I have just handed to Mr. Wooden are photostatic copies of documents in our files which were found by Mr. Royal, Attorney Examiner for the Federal Trade Commission during the

months of May and June, 1933; and at the request of Mr. Royal we made photostatic copies and handed them to him during the months of May and June, 1933.

There are certain tabulations and computations upon those documents which we are not able to identify. We don't know who put them on.

Mr. Wooden: Or whether they were put on in your office?

Mr. Conaghan: Or whether they were put on by any employee of the Universal-Atlas Cement Company.

Mr. Wooden: Your Honor, I offer at this time these exhibits numbered for identification 2268 to 2358, inclusive. Is that the way you have them?

14091 L. L. THORNHILL, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. MacIntyre.

I am State Procurement Officer, United States Treasury Department of Little Rock, Arkansas for the State of Arkansas. I have occupied that position continuously since July 17, 1935. I am the executive head of the office
14092 and in connection with my duties I have to do with the purchase of supplies.

Q. Will you please state what you have to do with the purchase of supplies in that office?

A. Well, it is the business of the function of the office to serve as a purchasing function for WPA and other New Deal agencies.

Mr. Zimmerman: Of what state?

The Witness: The State of Arkansas.

By Mr. MacIntyre:

Q. To purchase for WPA? Any other emergency relief agencies of the government?

A. Different branches of the Federal—of Farm Security, and the Soil Conservation Service.

Q. Do you in that connection purchase Portland cement?

A. We do.

Q. What procedure do you follow with respect to Port-

land cement; that is, with respect to receiving bids? Do you receive bids under seal, or how? Will you please inform us on that?

A. Bids are mailed out to be opened at a certain hour on a certain date, and under regulations must be in the office at that hour to be considered in that transaction.

Q. Do we understand you to say by that that you issue invitations to a number of persons or firms; that is,
14093 asking for bids under seal to be opened on a certain date?

A. Yes, sir, that is correct.

Q. Bids are received, then, under seal?

A. They are.

Q. What has been your practice with respect to sending out invitations for bids on cement? To whom do those invitations go as a general rule?

A. They go to cement dealers in the locality in which the cement is to be delivered.

Q. Do you send any to cement manufacturers?

A. We have at times.

Q. When did you start sending invitations for bids to cement manufacturers?

A. Well, immediately when we set the office up, we endeavored to buy it from cement manufacturers.

Q. That was during July, 1935?

A. Or the months immediately following.

Q. That is, you sent invitations to them for bids. Did you receive bids?

A. We did not.

Q. Did you find out why you did not receive bids?

14094 A. Yes.

Trial Examiner Norwood: How did you find out?

The Witness: By the fact that when we got no bids. That might not answer it very well, and also word of mouth by the cement salesmen.

Trial Examiner Norwood: Were there statements along with the bids that would show you why?

The Witness: The bids would not come back, Judge.

Trial Examiner Norwood: Oh!

By Mr. MacIntyre:

Q. You stated that you received some information as to why you did not receive any bids from cement
14095 salesmen, representing cement manufacturers?

A. Yes, sir.

The Witness: Read it again, please, sir.

(Question read.)

By Mr. MacIntyre:

Q. Will you answer that in any way that you care to?

A. The question is, did we receive—did we get information from the cement salesmen? Isn't that the question?

14096 Q. From cement salesmen representing cement manufacturers as to why their respective manufacturers did not submit bids.

Mr. Zimmerman: Now the question is more leading and suggestive than it was and for that reason, I object to it.

Trial Examiner Norwood: Objection overruled.

He may answer that.

A. Yes.

By Mr. MacIntyre:

Q. What cement salesmen or what companies whose cement salesmen called on you can you now recall having made such statements to you?

A. I couldn't remember that to answer that question.

Q. Well, if I mention the names of some of the cement manufacturers serving your district, would that serve to refresh your memory, do you think?

A. Not to remember the name of the man who we got the information from, no, but from the manufacturers, yes.

Q. All right. I will ask you if you can recall whether or not a salesman representing the Oklahoma Portland Cement Company made such statements to you?

14100 Q. Mr. Thornhill, I will ask you to state whether or not the salesmen who made statements to you as to why their respective manufacturing concerns did not bid were salesmen who represented cement manu-
14101 facturers serving the State of Arkansas, or soliciting business within the State of Arkansas from surrounding cement mills?

A. Yes.

Q. Mr. Thornhill, I will not ask you to state what was said to you by these salesmen as to why their respective manufacturers did not submit bids to you.

14102 A. I understood the question, Judge, to be as to the representatives and not the companies.

Trial Examiner Norwood: As what?

A. As to the actual men, the representatives themselves. I can name the companies.

14103 Trial Examiner Norwood: Name the companies.

A. Well, it is all of these major companies—

Mr. Zimmerman: (Interrupting) I do want to object to him naming the companies too because that couldn't be binding upon anybody. You don't know who represented them or claimed to represent them. You don't know the extent of their authority and it is absolutely impossible under those circumstances to do anything else than 14104 to gather gossip and hearsay.

Mr. Paulson: I think the objections are anticipatory, Your Honor, and out of point right now.

Trial Examiner Norwood: Yes.

Mr. Zimmerman: I object to him making such an answer: It is entirely improper.

Trial Examiner Norwood: Objection overruled.

By Mr. MacIntyre:

Q. Will you please name the companies specifically, Mr. Thornhill?

Trial Examiner Norwood: Name the companies that you had dealings with, and to whom you sent orders through people purporting to represent them, and where the orders were confirmed.

Mr. Zimmerman: He said he didn't have any orders; said he didn't buy any from them.

Mr. Paulson: Your Honor, he recalled without refreshing his memory that he had sales representatives of cement manufacturers give him reasons as to why the manufacturers would not bid. If that is allowed to stay in the record—either that should be striken or he should be allowed to clarify it.

Mr. Zimmerman: I agree it should be stricken.

Trial Examiner Norwood: I am permitting him to do that and give the names of these companies. I 14105 gave him some instructions there that insured it being based on his own knowledge.

Mr. Leisure: So that we may have the record clear, can we have the question read as to what it is that the witness is naming the companies with respect to.

Trial Examiner Norwood: Yes.

Mr. Leisure: I am not clear what the question is pending that is causing the witness to name a list of companies.

Mr. MacIntyre: I will be happy to restate the question so that the answer will immediately follow the question. There have been so many objections since it was asked.

By Mr. MacIntyre:

Q. Now, Mr. Thornhill, I will again ask you to state whether or not you can and will name the companies, cement manufacturing companies, whose salesmen in soliciting business from you, or in visiting your office, stated to you why their companies would not or did not submit bids in response to your invitations for bids?

Mr. Zimmerman: I object to that question, first, because it includes matter which is not in evidence. There is no testimony here which tends to show that any salesmen of any cement companies came into his office
14106 soliciting business. There is no testimony here which tends to show or lay any foundation, or the names of any persons who had any proper representation of any respondent in this case.

The question and the answer would be entirely without merit and would be improper unless it was followed up by the witness going into the nature of the conversations and what was said. That would be asking for pure hearsay and gossip, for which there has been no foundation laid by showing what the authority of such person was, the name of such person and the time and place of the person's presence.

Trial Examiner Norwood: If the Commission's counsel will lay the ground by establishing the fact that this witness did have dealings with salesmen, and thereafter they were confirmed by certain companies, then he can name the companies.

Mr. MacIntyre: We will have to go all over that ground again, if Your Honor please, since there have been so many objections raised to the testimony that has already been given.

Trial Examiner Norwood: That is right.

By Mr. McIntyre:

Q. Now, Mr. Thornhill, I will ask you whether or not after you sent invitation to bid to cement manufac-
14107 turing companies that you received any reply in the

form of a communication, telephone call or personal visit by representatives of such companies in response to those invitations?

Mr. Leisure: Now, if Your Honor please, in order that we may intelligently follow this record I ask that the question specify something, either time or place or manufacturers. I don't know what he is talking about.

Mr. Zimmerman: Then, too, he is going beyond the record in asking the witness now about some document which has not been identified or offered in evidence or in anywise exhibited.

I think, Your Honor's suggestion would get at the facts, and I don't see why it shouldn't be followed.

Trial Examiner Norwood: I think counsel is trying to do that.

Mr. Zimmerman: No. He didn't ask him if he ever bought anything and from whom it was, and so forth.

Mr. MacIntyre: If Your Honor please, the witness has testified more than twice already this afternoon that he did send invitations to cement manufacturers requesting them to bid, and he got no bids, and now I am asking him to please state in what form, if any reply was ever made to the invitations.

Mr. Zimmerman: Let's have the invitations; then
14108 we can see who they were sent to.

Trial Examiner Norwood: Objection overruled.

Mr. Leisure: Your Honor, may we know what manufacturers are being involved here?

Trial Examiner Norwood: You objected to their doing that until this other testimony should be in. Now, if you will just be patient he will bring that out.

Mr. Leisure: I am asking him to make clear and have the witness say to whom he sent these, so we will have an intelligent record.

Trial Examiner Norwood: Objection overruled. Let him answer this question.

Mr. MacIntyre: If Mr. Leisure will be patient, and all the excitement will subside for a few minutes we will try to bring that out.

By Mr. MacIntyre:

Q. Will you please state, Mr. Thornhill, whether or not in response to these invitations that you sent the cement manufacturers asking them to submit bids to you, you got responses in the form of telephone calls, writ-

ten communications or personal visits by their representatives?

Mr. Leisure: And I renew my objection to that question and call attention to the fact that—

Trial Examiner Norwood: (Interrupting) Off
14109 the record.

(A discussion ensued off the record.)

Trial Examiner Norwood: Read the question.

(The question was read by the Reporter.)

Mr. Zimmerman: I ask leave to state an objection to that question.

Trial Examiner Norwood: Objection overruled. Answer the question.

A. The invitations went to all the cement manufacturers: the Penn-Dixie, the Lone Star, the Marquette. I can't recall all of them, but it went to the manufacturers, —the only manufacturers we have in this country on cement.

Mr. Zimmerman: I now move that the answer be stricken, if the Examiner please, on the ground that it refers to communications which have not been identified or produced, and they ought to be. We cannot under any circumstances lay any decent record here or understandable record unless we do try to some extent to conform to the rules, and under the rules we have a right to know what communication was sent, and when it was sent, and to whom it was sent.

Trial Examiner Norwood: Objection overruled.

Mr. MacIntyre: If Your Honor please, when we get into the contents of such documents they will be produced.

14110 Trial Examiner Norwood: Yes.

A. Now, we had nothing—no communication whatsoever from the manufacturers, but these salesmen for the—

By Trial Examiner Norwood:

Q. You sent the bids directly to the manufacturers?

A. That is right.

Q. Yes.

A. That is right.

Q. All right.

A. These cement salesmen—

Mr. Leisure: (Interrupting) Just a minute. Are we just—I would rather the testimony would follow some

given question. I think the witness has answered to whom he sent them. Now he is starting to talk about the salesmen.

Trial Examiner Norwood: It is in answer to my question.

Mr. Leisure: May I have that read, because it isn't clear in my mind what question he is answering?

(The question was read by the Reporter.)

14111 Trial Examiner Norwood: Go ahead.

Mr. Zimmerman: Well, there is no question.

Mr. Leisure: There is no question pending.

Mr. Zimmerman: There is no question which calls for any answer.

Trial Examiner Norwood: Go ahead.

By Mr. MacIntyre:

Q. Now, if you please, Mr. Thornhill, I will ask since you received no communciation whether you received any visits by representatives of the manufacturers to whom you did send bids, including the Penn-Dixie, the Lone Star—

Mr. Zimmerman: Just a minute. I object, leading and suggestive.

Q. (Continuing) —and the Marquette, to which you made reference.

Mr. Zimmerman: The same ruling should apply to counsel for the Commission as has applied to counsel for respondents. They should not be permitted to ask leading and suggestive questions.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: Well, I think that is not of great value. He has already named these companies.

Mr. MacIntyre: If your Honor please, the record shows that he has not only named the companies, but he

14112 has already stated and testified before I had asked him a question of that nature, that representatives of those companies did call on him. I am merely attempting to—

Trial Examiner Norwood: I shall sustain the objection to the question containing these names and ask counsel to ask another one and leave that out.

Mr. Paulson: What answer might that leading question suggest, if you please?

By Mr. MacIntyre:

Q. Mr. Thornhill, I will now ask you to state whether or not you received any word, since you have stated you received no communications—any word or any response of any character from the manufacturers to whom you did send the invitations to bid?

Mr. Zimmerman: That he has answered a while ago. He said he received no communication of any kind from any of the manufacturers.

Mr. MacIntyre: I am now asking about reasons, not communications.

Mr. Zimmerman: And he has now again repeated the same answer.

Trial Examiner Norwood: Is that right, Mr. Witness?

The Witness: I answered the question, that I had not.

14113 Trial Examiner Norwood: All right. Go ahead.

By Mr. MacIntyre:

Q. Now, we understand you to have said that you did not receive any communications. I ask you to state whether or not you had received any responses or word of any kind from those manufacturers.

A. I would say that I could not definitely state that I had.

Q. Did anyone after your invitation to bid went to the Pennsylvania-Dixie Cement Corporation—did anyone representing the Pennsylvania-Dixie Cement Corporation visit your office?

Mr. Leisure: Now, I object to that. The proper way to ask him is to ask him whether or not anyone visited his office with respect to this, or some such question, without suggesting the answer to him.

Trial Examiner Norwood: Yes. The objection is overruled.

Mr. Zimmerman: That is exactly the same question except—it is the same question that was objected to and the objection was sustained a while ago where he included the names of several companies. The only difference is that now he includes the name of a single company.

Trial Examiner Norwood: I didn't get that fea-
14114 ture of it. The objection is sustained.

Mr. Paulson: Does Your Honor still consider it leading? What answer would this question call for?

"Yes" or "No" plainly, did a man visit your office. Does it call for a yes answer or does it call for a no answer?

Trial Examiner Norwood: The objectionable feature was the incorporating of the name of one of these respondents.

Mr. Zimmerman: If he would ask the witness who, if anyone, visited his office subsequent to the time when these invitations were sent out—

Mr. Paulson: And if that doesn't bring an answer, Your Honor, then he can say "Did John Jones visit you?" or "Did Henry Smith visit you?"

Mr. Zimmerman: Well, let us wait until we hear what the witness says.

By Mr. MacIntyre:

Q. All right, Mr. Thornhill. I will now ask you to state whether or not subsequent to your sending out bids, invitations for bids to cement manufacturers, in 1935, after you set your office up in July, there was made any reference at all to the invitations that you had sent out; that is, did any cement salesman or did anyone else visit your office and make reference to that?

14115 Mr. Zimmerman: Oh, no. Why not ask him without suggesting to him?

Trial Examiner Norwood: Wait. Will you please.

Q. (Continuing) And make reference to the invitation?

Trial Examiner Norwood: Now do you object?

Mr. Zimmerman: Nothing more. Thanks.

Trial Examiner Norwood: Read the question.

(Question read.)

A. The cement salesmen for all these companies come to the office—

Mr. Zimmerman: Now, just a moment. The question asked for only yes or no. "Did anybody visit your office?"

Trial Examiner Norwood: Yes.

A. They did.

By Mr. MacIntyre:

Q. All right. Will you please state who visited your office or which companies' salesmen, or what companies' salesmen visited your office?

Mr. Zimmerman: Oh, I think the question should be "Who did visit your office", if he knows.

Trial Examiner Norwood: I think that I shall permit the counsel to proceed, if he can establish a reasonable amount of certitude as to the things he gives us. We are becoming entirely too technical.

14116 Mr. Leisure: Your Honor, there are two questions. One is who visited, and whether or not they were representatives of manufacturers.

Trial Examiner Norwood: We are having great difficulty here, and I don't see the reason for all of it. Read the question.

(Question read.)

Trial Examiner Norwood: The objection is overruled and the witness will answer that question.

A. Salesmen for all the cement companies.

By Mr. MacIntyre:

Q. To whom you had sent invitations?

A. Yes.

Q. Now, will you please name the companies, as many of them as you can to whom you did send the invitations?

A. Well, they went to the Penn-Dixie—

Mr. Zimmerman: I think that has already been answered, if the Examiner please.

Trial Examiner Norwood: Well, let him answer it again.

Mr. Zimmerman: O. K.

A. The Marquette, Lone Star, Consolidated—

Trial Examiner Norwood: Off the record.

(A discussion ensued off the record.)

The Witness: I can't think of any more. It was 14117 all of them, anyhow.

By Mr. MacIntyre:

Q. Mr. Thornhill, I hand you a copy of the Commission's complaint in Docket 3167 and—Docket 3167, carrying a list of names of cement manufacturers. I ask you to look down that list, read it, and see if that will refresh your memory as to the names of any other cement manufacturers to whom you had sent invitations during 1935.

A. There is the Arkansas Portland.

Q. Arkansas Portland Cement Company?

A. I am pretty sure that is right. Ash Grove is one. I named that one (indicating).

I just came to the Hercules Cement. We have a Her-

cules Powder Company that I very well remember, but I am not certain about the Hercules Cement Company.

Lehigh, Marquette, Missouri Portland.

There is still some more of them?

Q. Oh, yes.

A. The Oklahoma Portland, Pennsylvania-Dixie, the Universal Atlas.

That is the list as I remember it.

Q. I believe you stated that you had sent these invitations out to those manufacturers that you named during 1935 shortly after you set your office up in July of that year?

A. That is right.

14118 Q. And that cement salesmen called on you subsequent to the sending out of those invitations.

Did any of those that did call on you make reference to the invitations which had been sent to any of these companies that you have named?

Mr. Leisure: Well, now, I wan to object to that. We haven't yet had the time fixed, either the time or the place or the names of the parties that he has been trying to get a conversation about. He has been trying to get a conversation without the names of the parties having been identified in any way. There is no way that you can follow such testimony; there is no way we can possibly meet it.

I further object to it on the ground that it is leading and suggestive.

Trial Examiner Norwood: Haven't you identified the time of this?

Mr. MacIntyre: We have. We have identified the time as July, 1935; we have identified the place as this man's office; we have identified the companies as those he has named.

Mr. Leisure: Not as to the dates of these conversations, Mr. MacIntyre.

Mr. MacIntyre: He said immediately subsequent to the sending out of the invitations during July, 1935.

14119 Trial Examiner Norwood: Objection overruled.

Mr. Zimmerman: And, furthermore, there is no showing whatsoever of the authority of any of these people to bind any respondent in any way. Your Honor well knows that it is a matter of common knowledge—

Mr. Paulson: There hasn't been any testimony—

Mr. Zimmerman: —that cement salesmen or any other salesmen have no authority ordinarily to bind their companies in any particular in matters of policy.

Mr. Paulson: There hasn't been any testimony by any of the salesmen yet, either. I say the objection is anticipatory. These are preliminary questions. The time to make that kind of an objection is not yet and may never come.

Trial Examiner Norwood: The objection is overruled. Read the question.

(Question read.)

A. It certainly was the subject of conversation between me and the employees of my office and these representatives. Whether they brought it up or we brought it up, I am unable to state.

By Mr. MacIntyre:

Q. But it was brought up in reference to the invitations when these people called to your office?

14120 A. Yes, sir.

Q. Now, will you please state, Mr. Thornhill, what was advanced by these representatives of these companies as the reasons why these companies did not submit bids, stating in so far as you can the representative of any particular company as to any particular reason advanced by that particular company and if it is different from the others as advanced by the other representatives of the other companies.

Mr. Leisure: If Your Honor please, the last part of the question attempts to cure the vice of this type of examination, but I submit that it does not cure it. We cannot have this Holus-Bolus testimony of a group without our knowing who the witness says said certain things. You can't ask him if a group of people said certain things.

Trial Examiner Norwood: Now, read the question.

(Question read.)

Mr. Zimmerman: May I state an objection to that?

Trial Examiner Norwood: I don't say that that question isn't all right, but I am going to sustain the objection for the time being, and ask this witness to give us his complete, definite experience with regard to these bids, refusals to bid with respect to these companies he has named, and their representatives, or their purported rep-

resentatives; that is, the people with whom you had
14121 been dealing as representatives of these companies.

Now, I shall anticipate an objection to that, and I shall overrule the objection.

Mr. Zimmerman: But it is our privilege to state the reasons for the objection.

Trial Examiner Norwood: Go ahead.

Mr. Zimmerman: If that is the question directed to the witness, I object to the question because the question calls for conversations with persons who are not shown to have any authority to bind anyone whatsoever. It calls for mere gossip and hearsay, which is improper to receive in evidence in this case.

Trial Examiner Norwood: Any further objection?

Mr. Zimmerman: The persons, of course, being entirely unnamed, and it calls also for a conclusion of the witness as to who those unnamed persons represented, which is improper.

Trial Examiner Norwood: Any further objections?

The objection is overruled.

Read that question to the witness.

(Question read.)

The Witness: All right. The office is frequented every day, or was at that time, with representatives of the principal manufacturers of cement bidding in that ter-
14122 ritory or covering that territory. They were not there for the purpose of selling the government cement—I mean, for selling me cement through my office, but to determine to watch these bids to see who was low and to sell the man who was low cement. That was the purpose of their being there.

The question naturally come up as to why can't we get bids from these manufactnrers. The manufacturers in reality tell the salesmen little. They don't know much. They know—they know—they knew that the manufacturers wouldn't bid, and they so stated, and we knew it, more or less of a policy or an agreement or whatever they have, that they would not bid from the manufacturing standpoint. The cement dealers that were in there knew that much, and that is all any of us knew.

By Mr. MacIntyre:

Q. Well, now, Mr. Thornhill—

Mr. Leisure: If Your Honor please, I want to move to strike that portion of the witness' answer where he makes

statements as to an agreement or otherwise as being his own statemefit and not as having come as binding upon any of the respondents. The witness, of course, is entitled to his own opinion, as we all are, but his opinion isn't binding on the respondents in this case, and I move to strike that part of the answer.

14123 Trial Examiner Norwood: Read that part of his answer, if you can locate it, Mr. Reporter.

(Answer read.)

Trial Examiner Norwood: Do you recall anything they did that would indicate what they knew?

The Witness: I wouldn't say. I couldn't say that I could, Judge.

Trial Examiner Norwood: I will allow the motion so far as it applies to any of this testimony as to what somebody else knew, but he can state what he knew about it or what he understood to be common knowledge.

Mr. Zimmerman: No, no, that is pure gossip and hearsay and has no foundation at all.

Now, it is also apparent from the answer of the witness that he was talking about people who were in there in connection with a letting that was being made not to cement manufacturers but to other than cement manufacturers.

Am I not right, Mr. Witness?

The Witness: That is right.

Mr. Zimmerman: The answer is yes, isn't it?

The Witness: That is right.

Mr. Zimmerman: Yes.

If your Honor please, to permit the witness—I am sure the witness does not intend to do anything

14124 improper. He is doing the best he can to answer questions propounded to him, but it is nevertheless improper for the witness to make a reference that he did as to any agreement or whatever else they had. Now, that part of the question and subsequently and that which follows should be stricken out, and I so move.

I join Mr. Leisure in that motion. That is highly improper.

Trial Examiner Norwood: Well, the motion is denied except as heretofore allowed, and the witness—

Mr. Zimmerman: I don't know what is to be stricken.

Trial Examiner Norwood: I think it is very clear; if not, we will make it clear when we receive the record.

Mr. Zimmerman: All right, sir.

Trial Examiner Norwood: But the witness can give us the result here of this experience which sprung from any transaction.

Go ahead with your examination.

By Mr. MacIntyre:

Q. Now, Mr. Thornhill, did we understand you to say that the cement salesmen that did call at your office frequently, daily, as you have stated, made statements that their companies would not bid and did not bid? Was that the testimony?

Mr. MacIntyre: I am trying to bring back to our
14125 mind what the record shows since we don't have the record before us.

Mr. Zimmerman: Now, if the Examiner please, that question is both leading and suggestive, and it is not in accordance with the testimony, and we should not ask questions as to what counsel understands or what the record shows. The record shows what it shows.

Trial Examiner Norwood: Read the question.

(Question read.)

Mr. Zimmerman: Now, he is asking what the testimony was, which is not proper. Whatever the testimony is, the record will show.

Trial Examiner Norwood: I think that counsel had better leave that off.

Objection sustained. If it is the testimony, it is already in the record.

By Mr. MacIntyre:

Q. Well, after you failed to get bids from cement manufacturers in response to the invitations that you sent out during July, 1935, Mr. Thornhill, did you send invitations to those manufacturers again on a subsequent date?

A. We sent them sufficiently—time sufficiently to determine that it couldn't be done, that they wouldn't bid.

Q. That is, you—

Trial Examiner Norwood: Off the record.
14126 (A discussion ensued off the record.)

Trial Examiner Norwood: Back to the record.

Mr. MacIntyre: May we have the last question, please?

(Question and answer read.)

14127 Mr. Leisure: I think the question calls for a "Yes" or "no", and then the next question would

give us an opportunity to state our objection, which should be on the record.

Trial Examiner Norwood: Well, counsel may—

Mr. Leisure: (Interrupting) The records themselves, of course, are the best evidence of this.

Trial Examiner Norwood: Counsel—

Mr. Leisure: (Interrupting) I do object. The records are the best evidence and we should have those, and I object to all of this testimony as purely cumulative. We have had four or five such other statements and they have all been purely cumulative.

By Mr. MacIntyre:

Q. After you failed to get bids after having sent these invitations a number of times to cement manufacturers, then what did you do?

Mr. Zimmerman: He hasn't said he sent them a number of times at all. He was asked directly if he sent any more after this first effort and he didn't answer the question. Now counsel assumes that he has testified that he has sent them a number of times, and there is no such testimony in the record, and I object to the question.

Mr. MacIntyre: The record will show.

14128 Trial Examiner Norwood: Read the question.

(The question was read by the Reporter.)

A. Sent invitations to dealers,—local dealers.

Mr. Zimmerman: What was Your Honor's ruling on the objection, please?

Trial Examiner Norwood: Objection overruled.

Mr. Zimmerman: Thank you.

By Mr. MacIntyre:

Q. Well, Mr. Thornhill, I will ask you to state what did you mean by the word "sufficiently" to determine that it could't be done in your answer with respect to sending invitations to cement manufacturers? Will you explain that?

Mr. Zimmerman: I object to that. The witness was improperly allowed to state a conclusion which wasn't in response to any question, and on motion to strike out that should have been sustained; but now he asks him to explain that which was improperly based to start with, a conclusion that the witness improperly made. I object to the question for the reasons stated.

Trial Examiner Norwood: Objection overruled.

Answer the question.

Q. Will you please state, Mr. Thornhill, what
14129 you meant by the word "sufficiently"—that is, you had sent the invitations to cement manufacturers sufficiently to determine that it couldn't be done? Will you tell us what you meant by that statement?

A. That answer is based somewhat on policy.

Q. What is that?

A. To remember just how much effort we went to to try to get these manufacturers to bid, or how soon we come to the conclusion that they would not bid I can't remember.

Q. Well, I will ask you to state whether or not you sent the invitations more than once and whether that had any connection with your word "sufficiently" as you used it?

Mr. Leisure: Can't we get one question at a time? It is very confusing to ask a witness two questions in that way because we can't follow it.

Trial Examiner Norwood: Answer the question.

Objection overruled.

A. As I remember, we sent them one way at one time trying to get it delivered on the projects, get it delivered at the towns, and they wouldn't bid. Then we determined to mail them again to buy it f.o.b. the factory and ship it by Government bill of lading. Then we tried that source and they still wouldn't bid.

Mr. Zimmerman: I object to all of this unless the
14130 invitations themselves, which are the best evidence,—the form of them be produced; and I move the answer be stricken.

I think the proper way to make a showing is to produce the form of invitation and have the witness testify as to the facts as to what was done with those invitations.

Trial Examiner Norwood: The objection is overruled. Motion is denied. Go ahead.

By Mr. MacIntyre:

Q. What did you mean by the words it couldn't be done,—that is, you determined it couldn't be done after that experience, Mr. Thornhill?

A. Just come to the definite conclusion that the manufacturers would not bid.

Q. And then you started sending the invitations to dealers as you have stated?

A. Local dealers, yes sir.

Q. Now, you used the word "local dealers" as you have just used it. What did you mean by that?

A. That gets into the policy of the way we have to buy the cement.

Q. Well, what is the policy in that respect?

A. The policy is that the only person who the cement dealers will sell cement on our contracts is the person who lives in that particular district or town, or a certain
14131 territory around him in which he can bid,—no outsider that lives 20 miles over yonder, that is not construed as being in that trade territory, belonging to this representative, can ship into his territory,—they won't sell him.

Q. Did you at any time in submitting invitations for bids to dealers submit invitations to more than just the local dealers?

A. Yes.

Mr. Leisure: If Your Honor please, I didn't object to the preceding question because I didn't want to be objecting so much, but it is very clear that we are now getting entirely without the issues of case.

We are asking this witness to tell us about his experience with dealers and we had quite a problem here in having him tell us about his experience with manufacturers. I think we should confine ourselves to the issues in the case.

Trial Examiner Norwood: I think he may give us a picture here touching the dealers.

Objection overruled.

Mr. MacIntyre: The effects upon the purchasing policies of the Federal Government and the effect on the public as a result of that is more certainly germane.
14132 Trial Examiner Norwood: Have you answered that question?

Mr. MacIntyre: I don't think he has.

A. I think I did.

Trial Examiner Norwood: Read the question.

(The question was read by the Reporter.)

By Mr. MacIntyre:

Q. With what result did you submit such invitations to more than the local dealers?

Mr. Zimmerman: I object to that question. I think that the question is improper because the only proper method is to produce the form of the invitations and for the wit-

ness to testify from his own knowledge as to whom it was sent and give us the facts and not conclusions. This witness, as the question calls for now, is apt to give a conclusion.

Trial Examiner Norwood: Read that question.

(The question was read by the Reporter.)

Trial Examiner Norwood: I don't consider that a conclusion at all.

Objection overruled.

A. We had more than one result.

By Mr. MacIntyre:

Q. With what results, Mr. Thornhill?

14133 Mr. Leisure: So I won't have to interrupt to each one of these questions, if this is his experience with dealers, I again point out to Your Honor that this witness's experience with dealers has no connection with this case, and I object to that entire line of testimony, whatever his experience or whatever the results may have been with the dealers.

Trial Examiner Norwood: Objection overruled.

A. The bids would be sent to this man in this particular locality and to others as well. In a few instances other people from outside have bid and were awarded the contract.

One particular case,—I got the file on it over there,—but he couldn't deliver, and we bought it against his contract and collected money from him, from a man who bid higher, later, because he couldn't deliver because the manufacturers would not sell it.

Mr. Zimmerman: I move the answer be stricken as containing conclusions for which there is no foundation whatsoever. The witness has not even named any names. He says he has the files. They haven't been produced.

The whole structure is based upon pure gossip and hearsay, speculation and conclusion; and for those reasons I move to strike it.

14134 Trial Examiner Norwood: Motion denied.

By Mr. MacIntyre:

Q. Well, you have named that as one of the results, Mr. Thornhill. Can you name any other results that you got in the submission of bids—I mean invitations to bid, to dealers?

A. In practically all cases we got no bids except from the man in his particular locality.

Q. In those cases, then, you got only one bid?

A. In some cases, yes.

Q. And that was from the dealer in the locality, did I understand you to say?

A. That is right.

(The paper writings referred to were marked "Commission's Exhibits 2611-A to E, inclusive," for identification.)

By Mr. MacIntyre:

Q. Mr. Thornhill, I am showing you documents which have been marked for identification as Commission's Exhibits 2611-A to E, inclusive. I ask you to state what they are, if you can.

A. This is a list of our cement dealers in the different localities in the State.

Q. In what State?

A. State of Arkansas.

14135 Q. Do you know anything about where the list came from?

A. Yes. It was made up in my office in conjunction with our working with the different representatives of the different manufacturers.

Q. From what information?

A. Our information was taken from theirs. In other words, supplied by them,—these different dealers.

Q. The names of these dealers were supplied to you by the representatives of the cement manufacturers and the list made up in your office?

A. That is right.

Q. Is that your testimony?

A. That is right.

Q. And those were the representatives of the cement manufacturers that you have named here this afternoon, or were they?

A. Yes.

Mr. Leisure: He hasn't named them yet at all.

Mr. Zimmerman: If the Examiner please, cannot we have questions which are not leading and suggestive? That question is absolutely improper.

Trial Examiner Norwood: Read the question.

(The questic was read by the Reporter.)

Mr. Zimmerman: I say that that question is leading and suggestive and I think we ought not to pursue
14136 that policy. It is just so continuous—the reason we have taken so much time here is because that practice has continued and continued and continued. The question is not a proper one.

Trial Examiner Norwood: I think that I will sustain the objection.

Mr. Zimmerman: It, of course, follows that the answer will be stricken?

Trial Examiner Norwood: I will ask counsel to confine himself to proper questions.

Mr. Zimmerman: I take it that the answer would be stricken?

Trial Examiner Norwood: Be stricken, yes.

By Mr. MacIntyre:

Q. Mr. Thornhill, I will ask you to state who furnished you with the information that was used in making up this list of dealers, now marked for identification as 2611-A to E?

Mr. Zimmerman: That calls for the names of the persons that gave him the information.

Trial Examiner Norwood: That is right.

A. The representatives of the different—

Mr. Zimmerman: (Interrupting) No sir; I object to that and I ask that he now state the names. Your Honor ruled upon it and he heard it.

14137 A. I can't state the names.

Trial Examiner Norwood: State the names if you know them.

Mr. Zimmerman: I would like to find out if he can or not, first.

Trial Examiner Norwood: State some definite information about them that will enable us to locate them, determine who they are.

A. The names of the persons or the manufacturers?

Mr. Zimmerman: Yes; the names of the persons that gave you the information.

A. I can't remember.

Trial Examiner Norwood: Can't remember the names? Can you remember the circumstances that identify them with any of those companies?

A. I could get the names and remember them that way, Judge, yes.

Mr. Zimmerman: If he can get the names I think he ought to do it.

Trial Examiner Norwood: Yes. Get the names.

By Mr. MacIntyre:

Q. I am asking you now if you can recall anything—if you can't recall the names, anything about what caused them to be in your office at the time.

Mr. Zimmerman: I object to that. He said he
14138 can get the names and I thought he ought to do it.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: I am asking him another question now, if Your Honor please.

Mr. Zimmerman: The question is objectionable.

Mr. MacIntyre: I am asking him to name the people he brought to his office to help him make up the list.

Trial Examiner Norwood: Objection overruled, as to the last question.

Give us what information you can about these names.

A. That has been three years ago, the date he is talking about now. However, this list is up to date now, for that matter. They have changed along and along. Whether I can give you the ones back there that began this list I don't know.

Trial Examiner Norwood: Give us all the facts concerning your compilation of that paper, where you got the facts.

A. Well, the facts are that with the representatives of these companies, Judge, we accumulated these names. They were given to us by them as being their representatives in those different territories.

Trial Examiner Norwood: Yes.

By Mr. MacIntyre:

14139 Q. You said the representatives of those companies. Will you please name the companies that you had reference to there?

Trial Examiner Norwood: Yes.

By Mr. MacIntyre:

Q. That is, of which those people were representative insofar as you know of your own knowledge.

A. The Penn-Dixie, the Marquette and the Lone Star and the Universal-Atlas. I believe there is a Consolidated

outfit in there. That is all I can remember, is "Consolidated." I don't remember the last name.

Q. Now, Mr. Thornhill, I will ask you what you have—

Trial Examiner Norwood: (Interrupting) What did they—what did these representatives do; give you the data?

A. That is right.

Trial Examiner Norwood: From which you made that paper?

A. That is right.

Trial Examiner Norwood: Yes. All right.

By Mr. MacIntyre:

Q. What was the nature of the data that they furnished you, Mr. Thornhill?

A. Well, in making up the list we would say "Who are the cement dealers in this locality" and "who are
14140 this and who are these and who are here" to get the whole picture ready so that when the W.P.A. or any organization asked to buy cement that we would know who to send the bids to in that locality.

Q. Did they tell you anything about who they would or would not sell to in those localities?

Mr. Leisure: If Your Honor please, I want to object to that. We have got unnamed persons.

Trial Examiner Norwood: Yes.

Mr. Leisure: Being designated, and Mr. MacIntyre is now asking him what certain unnamed individuals told this witness, and, surely, if we are going to have the contents of the conversation we have a right to know who the parties were to the conversation.

Mr. MacIntyre: If Your Honor please, the witness—

Trial Examiner Norwood: (Interrupting) I think this witness here can give us the facts regarding the source of the information that he has put in the paper.

Mr. Leisure: He can if he knows, but if he doesn't know who they are I object to him telling us of the conversation.

Trial Examiner Norwood: He is telling us where he got this information. Objection overruled.

The Witness: Read the queston again.

14141 Trial Examiner Norwood: Read the question.

(The question was read by the Reporter.)

A. Well, I am sure in going over it that we might sug-

gest somebody that we have—knew in the community, and asked "Why not this one"? in some cases the answer would be "He isn't financially able to buy and we can't sell him."

By Mr. MacIntyre:

Q. Was there any difference in the lists of cement dealers suggested to you or furnished to you by one representative of one of these companies from the list of the dealers or the names of the dealers furnished to you by the representatives of the other companies?

A. We worked them out together, all altogether and agreed on the list,—they did themselves, with us.

Q. And this list here is the result of the working out of that list by the representatives of the cement manufacturers, is that right?

A. That is right.

Q. And will you please state, Mr. Thornhill, in what manner you have used this list since it was compiled?

A. We have used it for all of our cement bids. We have to use it.

Q. Well, in what manner have you used it in connection with your cement bids?

A. All right. If we want—

14142 Mr. Leisure: (Interrupting) Now, does my objection cover this when we are talking about how this witness used a list with reference to dealers?

Trial Examiner Norwood: Yes.

Mr. Leisure: Does my objection cover that?

Trial Examiner Norwood: Yes sir. Objection overruled, and counsel may have an exception.

A. Well, answering the question; pick out Lake Village,—we have two cement dealers listed at Lake Village, and they want cement delivered in Lake Village. We will send bids to these two dealers only.

Q. Why don't you send them to other dealers?

A. Because we know they won't bid. Even if they did bid they get themselves in a jam because they can't buy the cement.

Mr. Zimmerman: I object to that and move the answer be stricken.

Trial Examiner Norwood: Objection overruled.

Mr. Zimmerman: Conclusion of the witness for which there is no foundation whatsoever in the record.

Trial Examiner Norwood: Objection overruled and motion is denied.

Mr. MacIntyre: If Your Honor please, I will now offer in evidence document marked for identification as Commission's Exhibit 2611-A to E.

14143 Trial Examiner Norwood: Are there any objections?

Mr. Leisure: Yes.

Mr. Zimmerman: There are plenty.

Mr. Leisure: A few. We object to the list as being incompetent, irrelevant and immaterial and as founded on hearsay evidence, and we point out to Your Honor that the dealings between the witness and third parties, namely, the dealers, are not within the issues of this case in any way.

Mr. Zimmerman: And the further objection is that there has been no proper foundation laid for its admission in evidence, and, further than that, that it is not within the confines of the scope of any complaint sent forth in the complaint of this case; no relevance or materiality or reference thereto.

Mr. MacIntyre: If Your Honor please, I would like to supply whatever additional foundation is necessary for the document by an offer of proof at this time. First, this document on the basis of testimony of this witness, was compiled in large part by representatives of the respondent companies.

Second, it is the most concrete production of the result of the definition of what a cement dealer is, as is alleged to have been the concerted action of the respondents as pointed out in one of the paragraphs of the com-

14144 plaint, than any possible piece of evidence that we could get outside of the definition itself, because this is the list of the dealers that are recognized by that group of the respondents as falling within that group of defined, established, legitimate cement dealers to whom they will sell at particular destinations, and only at those particular destinations.

14146 Kansas City, Missouri,
January 19, 1939.

14147 L. L. THORNHILL resumed the stand, having been previously sworn, and testified further as follows:

14148 (COM. EX. 2611-A to E was offered and received in evidence.)

14149 By Mr. MacIntyre:

Q. Mr. Thornhill, the record doesn't appear to be entirely clear from your testimony yesterday afternoon concerning the facts surrounding this document, Commission's Exhibit 2611-A to E.

I am now handing it back to you and asking you to state whether or not you will give us in as clear and concise and in as few words as possible the facts as you now recall them surrounding that document.

Mr. Leisure: Well, now, if Your Honor pleases, that is much too broad a question. The facts surrounding that document may or may not be admissible, and if counsel has any question he wants to ask him as to the document so that we can object to it if it is an improper question, then I shall not object until the proper time, but just to ask the witness a broad general question of that kind is not proper examination. That means "Mr. Wit-
14150 ness, what is your name? Will you tell us everything you know about this case?"

Trial Examiner Norwood: I shall instruct the witness to answer that regarding the circumstances of the making of the list.

Mr. Leisure: But unless—

Trial Examiner Norwood: And the data from which he secured it.

Mr. Zimmerman: When Mr. Leisure has finished, I have something I want to add to it.

Mr. Leisure: But unless counsel is afraid the witness may say something which may be objectionable, and I have reference to the witness' testimony of yesterday, I see no reason why we should not proceed in an orderly manner by question and answer form rather than put a

witness on the stand, swear him, and have him tell all he knows about the case.

I think that is an improper method of examination.

Trial Examiner Norwood: If a witness gives any improper testimony, I shall entertain a motion to strike.

Mr. Leisure: And I propose to make such a motion at the proper time.

Trial Examiner Norwood: Yes.

Mr. Zimmerman: May I add to that, that here is a document which Your Honor has already ruled is ad-
14151 missible in evidence. Now, if there is a sufficient foundation laid for its admissibility in evidence, anything further than that would be merely encumbering the record. The record speaks for itself. He is not asked now to go into anything except the ground work that he says is not clear. Evidently, it is not sufficiently clear to sustain its admission in evidence, and I move that it be stricken now from the record. If any further foundation is to be laid, we can make our objections in due order.

Mr. MacIntyre: If Your Honor please, it was not my thought when I said that the record isn't as clear as we would like it, that it isn't clear sufficiently to show that this document is admissible in evidence, but it is my thought that the witness may possibly be able to add to this testimony of yesterday concerning the sources and the making of the document.

14152 Mr. Zimmerman: Then he ought to be asked exactly that question.

Trial Examiner Norwood: Yes.

Mr. Zimmerman: Who made it?

Trial Examiner Norwood: I shall deny counsel's motion to strike the exhibit from the record and ask the counsel to ask particular,—more specific questions.

By Mr. MacIntyre:

Q. Mr. Thornhill, I will now ask you to state whether or not you can add to your testimony of yesterday concerning the making of the document,—that is the preparation of this document and sources from which you obtained it, if you can?

Mr. Leisure: That is the same question just stated over again.

Trial Examiner Norwood: That is a question he can answer "Yes" or "No".

Mr. Zimmerman: That is correct, and that is the only way it can be answered, or should be.

Trial Examiner Norwood: Answer "yes" or "no" if you can add more particular information on this paper.

A. I can elaborate on it.

By Mr. MacIntyre:

Q. All right. Will you please do so? Give us any additional facts you possibly can concerning this doc-
14153 ument as to its reception and your receipt of it, and from whom.

Mr. Leisure: If Your Honor please, there is three questions in one, and I submit that the orderly way of proceeding is to ask the witness questions so that if they do tend to bring out improper questions we can object to the questions, rather than trying to ask him in one general sweeping statement a question which will allow him to make a speech on the subject.

Trial Examiner Norwood: I think you can do better if you will ask specific questions.

Mr. MacIntyre: All right.

By Mr. MacIntyre:

Q. Mr. Thornhill, I will ask you if you can add anything to your statement concerning the information upon which this document is based?

Mr. Zimmerman: Well, that is still asking the gentleman to perform as an elaborator on something.

Trial Examiner Norwood: I shall overrule your objection on that. Answer the question.

Mr. Zimmerman: Well, I do object to the question as improper.

Trial Examiner Norwood: Yes. I realize we will never get anywhere unless I do.

Mr. Zimmerman: Why not? Don't you think Your Honor might suggest to counsel for the Commis-
14154 sion that he ask proper questions so that we could get somewhere?

Trial Examiner Norwood: I think not.

Mr. Zimmerman: We must persist in our objections as long as improper questions are asked.

Trial Examiner Norwood: I do not consider that improper.

Mr. MacIntyre: If Your Honor please, we cannot understand why it is that counsel for the Respondents insist

that this witness not be given the opportunity to testify about the source of this document as we now want him to tell on the stand, the facts.

Mr. Leisure: We have stated very clearly our reasons for our objections.

Trial Examiner Norwood: Proceed.

By Mr. MacIntyre:

Q. Will you proceed and answer the question, Mr. Thornhill?

A. In my official capacity the buying of cement is absolutely necessary, and the buying, in many instances, promptly, is also necessary.

Mr. Zimmerman: Now, if the Examiner please, I interrupt because that is entirely without the scope of the question and is an entirely improper voluntary statement, and the witness ought to be admonished not to continue in that vein.

Trial Examiner Norwood: I shall ask the coun-
14155 sel to permit the witness to finish his answer and then you can make any motion you desire.

A. In order to be able to do that, because of the cement situation, it is necessary that we know from whom we can buy. Then, to be able to do that, then certain things are necessary in that we have got to know from the cement salesmen to whom you will sell. Therefore, it is necessary to call them in, in making up such a document, to determine who that we can buy cement from, and where, and for that reason we come in together with the various representatives of the various cement agencies and between them and my office we make up this list.

By Mr. MacIntyre:

Q. From what information, Mr. Thornhill?

A. From the information furnished by them, primarily. There is no need of us trying to buy cement from somebody they won't sell cement to. Therefore, in conjunction with them, and in my office, we make up this list; and we know in every locality in Arkansas and every man in Arkansas to whom it is practical for us to send a bid for cement.

By Trial Examiner Norwood:

Q. Do you know that from your actual investigations?

A. I know that from my working in this task.

Mr. Zimmerman: Is it now proper for us to make a

motion to strike out that testimony on the ground
14156 that it is based on pure speculation?

Trial Examiner Norwood: Will you please make your motion and state your grounds and not argue?

Mr. Zimmerman: My dear sir, that is exactly what I have done. If the record will be read you will see it.

Trial Examiner Norwood: Motion is denied.

The Witness: Have I answered the question?

Mr. MacIntyre: Yes, sir.

By Mr. MacIntyre:

Q. Will you please state whether or not you received any information as to whether you could or not buy from any persons that are not named on that list?

Mr. Zimmerman: I object to the question.

Trial Examiner Norwood: Well, I think—

Mr. Zimmerman: (Interrupting) The question is much too general in its form.

Mr. MacIntyre: That is a preliminary question.

Trial Examiner Norwood: Read that question.

(The question was read by the Reporter.)

Trial Examiner Norwood: Answer that "yes" or "no". Objection overruled.

A. I would answer that yes, qualifiedly.

By Mr. MacIntyre:

Q. Well, with what qualifications, if you can
14157 state the qualifications?

Mr. Leisure: Now, if Your Honor please, I object to the preceding question and this question and to any future question along this general line. Whether or not you received any information from any source is not a proper question. It must be brought in within the confines of this case. That does not bring it within the confines of this case. It might have been from any Crown head of Europe or anything that your imagination wants to go to. It is not a proper question and I object to it as incompetent, irrelevant and immaterial.

Trial Examiner Norwood: Objection overruled. Answer the question.

A. Well, we are careful. The reason for being careful in placing an order is that if we get tied up on somebody that can't deliver, then we have got the job tied up and they are giving us the devil for not delivering that stuff.

Trial Examiner Norwood: The question is, what are the qualifications that you would make?

A. I am leading up to that, Judge.

Trial Examiner Norwood: All right.

A. Then we have an inquiry, say, from some two by four or little merchant down here that we don't have on the list, wants to bid. We are afraid to do it. Then
14158 we inquire "What about this man?" "His credit rating is not sufficient to buy a carload of cement. We can't sell him." That is the qualification.

14159 Q. You inquired of whom, Mr Thornhill?

A. Of the agents of the cement dealers. Not the dealers, but the cement representatives.

Q. Of cement manufacturers?

Mr. Leisure: May we have the time and place fixed of this inquiry? We have got a conversation now between unknown parties, or, at least, one unknown party. He said he inquired from some one. Surely, we have the right to know who this conversation was with so that we can follow it up, find whether or not his memory is entirely correct. As it stands now it would be necessary for us to subpoena all the employees of every company that serves that section, several thousand, and ask them all whether or not they made such a statement to this witness. I don't think we should be put to that burden.

Trial Examiner Norwood: If counsel will be patient, I think that will come out in due time, and I overrule your objection.

Mr. Leisure: It didn't yesterday.

Trial Examiner Norwood: Yes.

Mr. Leisure: It didn't yesterday.

Mr. Zimmerman: We haven't got a single name in the record yet.

Trial Examiner Norwood: Answer the question.

14160 A. That would have to be stated, please.

(Question read.)

Mr. Zimmerman: There is a further ground for a motion to strike out which I now present. This witness has no right to characterize any unknown person or any known person as the agent for some one else. No one can prove agency in that way in any court of law or any place else where the rules of fairness and evidence are recognized that I ever heard of, and I move to strike out the answer.

Trial Examiner Norwood: The motion is denied.

The Witness: What is the question?

Mr. MacIntyre: Will you read it, Mr. Reporter?

(Question read.)

A. Cement manufacturers' representatives.

Trial Examiner Norwood: Now, will you please give me the time you are referring to there?

The Witness: Well, it would be all through the programs, Judge, your Honor.

Trial Examiner Norwood: Between what years was that list made up?

The Witness: Between 1935, in July, and the present date.

By Mr. MacIntyre:

Q. Has it been a regular and constant reoccurring situation?

14161 A. This is a breathing living thing. That happens continuously and works all the time and has to work.

Q. Will you please state whether any of these representatives of cement manufacturers who called at your office and furnished you with the information from which this list is made up, as you have stated, furnished you with any names of other dealers than those appearing on the list?

Mr. Leisure: I object to that.

Mr. Zimmerman: If the Examiner please—pardon me, Mr. Leisure.

Mr. Leisure: I object to that until the representatives that counsel mentions are in some way designated so that we can follow it, so that we will not have to subpoena several thousand employees to find whether or not they are the ones that this witness says talked to him.

Trial Examiner Norwood: This witness has designated the manufacturers with whom he dealt, and he says that these are the agents, and it is very easy for these manufacturers to find out who the agents were at these times.

Mr. Leisure: I am pointing out, your Honor, that we have no way of knowing as to what agents he is now talking about.

Mr. Zimmerman: Or what persons may have rep-
14162 resented themselves as agents for whom.

Trial Examiner Norwood: Objection overruled.

Mr. Zimmerman: If the Court please—or if the Examiner please, pardon me—

Trial Examiner Norwood: I have already ruled on that.
Mr. Zimmerman: I realize that you have.
Trial Examiner Norwood: Off the record.
(A discussion ensued off the record.)
14163 Trial Examiner Norwood: Back to the record. Go ahead, Mr. Thornhill.
A. Answering the question—
Mr. Zimmerman: (Interrupting) What was the question, may I ask, please?
Mr. MacIntyre: Will the Reporter read it, please?
(The question was read by the Reporter.)
A. They have.

By Mr. MacIntyre:
Q. What became of the names of the dealers thus furnished?
A. They went on our list.
Q. The list that you have in your hands contains all of the names that now remain as the approved list of dealers, or are there other dealers that are approved that are not on that list?

Mr. Leisure: If Your Honor please, I want to object to that question on the ground that it is incompetent, irrelevant and immaterial; but I do not base my objection on that legal ground alone whatever. I base it upon this proceeding with those questions being grossly unfair to the defendants and it is grossly unfair and improper for the following reason: That as the questioning is going forward now it will be necessary for us to subpoena all of the employees of the companies that are repre-
14164 sented in this witness's territory and ask them by some kind of inquisitorial method whether or not they did make the statements which this witness is testifying to today; and I object to the question on those grounds and upon the legal grounds.

Mr. Zimmerman: May I add to that the further objection that the testimony called for by this question—the question itself is objectionable because it attempts to sum up and characterize and contain within it a characterization, and call for a conclusion which would agree with such characterization of the evidence; and, further than that, it would not help the respondents in this case one iota if we went out and subpoenaed and brought in here every cement salesman that ever worked in that territory or ever saw this imaginative young man on the witness stand.

Trial Examiner Norwood: Counsel is arguing.

Mr. Zimmerman: I am trying to state to you exactly why our objections should be made.

Trial Examiner Norwood: That same objection is already made.

Mr. Zimmerman: It is not the same objection, and I should like to finish.

Trial Examiner Norwood: Off the record.

14165 (A discussion ensued off the record.)

Trial Examiner Norwood: Objection overruled. Answer the question.

Mr. Zimmerman: Now, if the Examiner please, I should like the record to show that I attempted to state an objection, that I was interrupted midway by the Examiner who said "off the record", and I would like to proceed with it.

Trial Examiner Norwood: The record may show that I refused the counsel the right to argue this point further. I have ruled on it. You can do your arguing—

Mr. Zimmerman: (Interrupting) Let me state it in this fashion: That there is no way for us to weigh the evidence; that under the rules and under the statute if there is any evidence to support any finding of fact that may be made, that is sufficient. Therefore, we cannot meet this by bringing in any number of people when this is treated as evidence against the respondents.

Trial Examiner Norwood: Read the question.

(The question was read by the Reporter.)

A. This contains the complete list on the day I left.

By Mr. MacIntyre:

Q. When was that?

14166 A. Tuesday, the 17th.

Q. January 17, 1939?

A. Yes.

Q. I notice, Mr. Thornhill, that under the names of some of the towns listed for the State of Arkansas there are only one dealer listed for each one of a number of the towns. Can you tell me what you do sending out invitations to bid to dealers for delivery of cement at those towns?

A. In order to satisfy our own regulations, in most, if not all instances, we send this man a bid, and others in his adjoining towns to bid also.

Q. With what result?

A. With the result in nearly every case that we get one

bid, and that is from the man in the town that we want the cement.

Q. What do you do when you receive only one bid in a case like that?

A. If it is proper, or if he is not charging the Government what, in our determination, is too much money, we award him the contract.

Q. Has the Comptroller General of the United States communicated with you in any way concerning the receipt of only one bid on proposed lettings of contracts for cement?

14167 A. They made an exception, or wrote us about—I know of one specific case where we had only mailed one bid and only received one bid.

Q. What action, if any, was taken by the Comptroller General of the United States with respect to a situation of that kind?

A. He asked for an explanation and we gave it in accordance to the facts, and he allowed the purchase.

Q. What was your explanation under those circumstances?

A. That it was useless to send to anyone else except the bidder who secured the bid.

Q. What do you mean it was unless to send invitations to other than those,—than the one who submitted the bid?

Mr. Leisure: I merely rise to point out to Your Honor in this objection that we are now dealing with written communications. I don't suppose it would do any good, but I want to point out that we are now dealing with written communications and this witness is giving us the substance of them.

Trial Examiner Norwood: Why hasn't the counsel objected before? I listened for an objection. Your remarks that you suppose it will not do any good are not appreciated.

Mr. Leisure: My remarks, Sir, are part of my objection. Those are my objections to the present
14168 line of examination.

Trial Examiner Norwood: I say those are not appreciated.

Read the question.

(The question was read by the Reporter.)

Mr. MacIntyre: That is, other than the one that submitted the bid, rather than "those".

By Mr. MacIntyre:

Q. Will you please answer that question, Mr. Thornhill?

Trial Examiner Norwood: Now, this witness is asked to explain a former statement. The former statement was given in without objection prior to that time.

Mr. Zimmerman: May I ask—

Mr. Leisure: (Interrupting) I have an objection to the entire line of testimony, if I am not mistaken. At least, that was my intention.

Trial Examiner Norwood: I didn't so understand it.

Mr. Zimmerman: I thought we had made almost every form of objection that we could, and, as you say, you had overruled them and it didn't seem to me that it would be necessary for us to make a separate objection each time to each question under the circumstances. If that is what we must and should do we will do it after this as far as I am concerned.

14169 Trial Examiner Norwood: That was an erroneous conclusion on the part of counsel, and if that is a motion to strike the answer and to rule out those previous questions, I shall consider it.

Mr. Zimmerman: Such a motion is certainly made. I really thought it wasn't essential. I really felt that your Honor wanted us not to continue.

By Mr. MacIntyre:

Q. Well, Mr. Thornhill—

Mr. Zimmerman: We do present such a motion, your Honor.

Trial Examiner Norwood: Well, as soon as we can designate it in the record, I shall entertain the motion to strike it.

Mr. Zimmerman: All right, sir.

Trial Examiner Norwood: Go ahead.

Mr. MacIntyre: May I inquire as to the state of the record now? The witness has answered several questions.

Thial Examiner Norwood: The testimony he gave with regard to these written communications, I shall consider a motion to strike that.

Mr. MacIntyre: All right.

By Mr. MacIntyre:

Q. Mr. Thornhill, I will ask you whether or not

14170 that in the instances where you have received only one bid on proposed lettings for contracts for ce-

ment, has the Comptroller General of the United States taken any action with respect thereto? Will you please state of your own knowledge.

Mr. Zimmerman: Well, the question is preliminary, I take it, and, therefore, we would object to not the line but to his stating what the Comptroller did or the contents of any opinion of the Comptroller General or a communication therefrom.

Trial Examiner Norwood: I don't see how this action of the Comptroller is relevant.

Mr. MacIntyre: The Revised Statutes require that there be competition in the purchase of materials by procurement officers of the United States. It is 3709, is it, the section?

What I am attempting to now show through the witness is whether or not there has been complaints on the part of the Comptroller General as to whether or not the single bid that he received in these instances were or were not in the opinion of the Attorney General competition within the meaning of that section of Revised Statutes.

Mr. Wooden: Your Honor—

Trial Examiner Norwood: That wouldn't—

Mr. Zimmerman: I do not think that makes it relevant or material.

14171 Mr. Wooden: Your Honor, I want to state that the ground or relevancy in this matter is that when respondents start a chain of circumstances in motion, the result of respondents' acts may be—

Mr. Zimmerman: Is this to be on the record?

Trial Examiner Norwood: Yes, it is on the record.

Mr. Zimmerman: All right.

Mr. Wooden: —may be traced to the end, and may be brought in, those results, in some cases under the res gestae exception to the hearsay rule.

These respondents have set in motion—it has been proven in this case, I contend, at least, and there has been evidence offered and received showing that respondents did set in motion the forces which have resulted in the testimony that is sought to be brought out.

Mr. Zimmerman: Oh, I deny that. Certainly, I can't understand how we could be made responsible for this testimony even by the wildest stretch of imagination.

Trial Examiner Norwood: I think that you may show by this witness these facts that are within his knowledge

resulting from his experience and contacts in the purchase of cement.

Mr. Zimmerman: Yes.

Trial Examiner Norwood: He can state those
14172 facts and all of those facts.

Mr. Zimmerman: Yes.

Trial Examiner Norwood: Regardless of any objections.

Mr. Zimmerman: But this goes a little farther.

Trial Examiner Norwood: And he can state any facts that would indicate the results, but as for the Comptroller General's action, and all, in the first place, that is already in, as I understand, those orders of the Comptoller General.

Mr. MacIntyre: If your Honor please, the order of the Comptroller General that you have reference to had to do with the application of the so-called control clause. Now we are talking about an entirely different matter, and that relates to orders or complaints by the Comptroller General which binds this officer of the United States Government to a particular procedure.

We are attempting to have him to tell us what the Comptroller General of the United States has done to bind him with respect to his official duties in connection with his purchases of cement under a particular and peculiar set of circumstances.

Mr. Zimmerman: Well, it is in writing?

Mr. Leisure: Of course, the opinions of the Comptroller General are the best evidence on that.

14173 Trial Examiner Norwood: I think that he can tell us what he did pursuant to instructions from the Comptroller General.

Mr. Zimmerman: That is, you mean if the Comptroller's office sent out a communication to him, that without the production of that the witness may characterize it and state what he did?

Trial Examiner Norwood: He may state what he did, but if you want to put the instructions in, you will have to get the printed instructions.

I shall sustain the objection.

Mr. MacIntyre: What was the last question, may I ask?

(Question read.)

Trial Examiner Norwood: That was objected to, and the objection is sustained.

By Mr. MacIntyre:

Q. Mr. Thornhill, I will ask you what action you have taken when you have received only one bid for delivery of cement in response to invitations that you sent out.

Mr. Zimmerman: I believe that has been answered.

Trial Examiner Norwood: Objection overruled.

Mr. Zimmerman: I thought he told us just a little while ago exactly what he did.

Trial Examiner Norwood: He can answer it again.

14174 Mr. Zimmerman: All right.

A. If the prices were proper and we considered it not exorbitant, we awarded the contract even though we only secured one bid.

Q. Well, have you in all instances awarded contracts when you received only one bid?

Mr. Zimmerman: If the Examiner please, I object to going too far afield. We must realize that the testimony that is now being asked for is as to the action of the procurement officer in his conduct of affairs with not cement manufacturing concerns which are respondents here, but as to material, building material dealers resident in Arkansas in no wise connected with this case, and I think that is clear.

Trial Examiner Norwood: We have already ruled that such material is relevant here.

Mr. Zimmerman: All right.

Trial Examiner Norwood: Objection overruled.

Read the question.

(Question read.)

A. No.

By Mr. MacIntyre:

Q. Will you please state, Mr. Thornhill, what you have done in the other instances in which you have awarded, in cases where you received only one bid?

14175 A. Readvertised them.

Q. That is, submitted invitations to dealers in the same localities to the same dealers again?

A. Yes, we have done that in most instances.

Q. With what results?

A. Still get the same one bid.

Q. Have you in all instances after having followed through with that procedure let contracts to that one dealer?

A. No.

Q. What has been the procedure, then, in some of those instances where you haven't done that?

A. Well, we have sent out bids again, or we have changed the destination and seek bids in another locality, asking the requisitioning agency if they may not be able to pick it up and deliver it over there themselves.

Q. That is, in submitting invitations to bid to still other dealers in other localities?

A. Yes.

Q. And did you change the location of the use of the cement in that instance, or just what did you do with respect to the use of the cement?

A. Well, we rarely changed the destination, asked the requisitioning agency to change the destination, in order that we might buy the cement at a reasonable price where we could get new dealers to bid on it.

14176 Q. You bought at a diffe nt place. Did you use it in the place where you bought it in that case?

A. Yes, it was bought for that purpose.

Mr. Leisure: Couldn't we have counsel just ask the witness questions and not continue to be leading over this entire line?

Trial Examiner Norwood: The point is well taken.

Do you object to that question?

Mr. Leisure: Well, not more than the others, but I just hope in the future he will cease to lead.

Mr. MacIntyre: We will be very happy to delete the question and the answer, since counsel considers it leading. So I will ask the reporter to delete it completely from the record, the question and the answer.

Mr. Zimmerman: I think that we might just as well now move to strike out the entire testimony of this witness on the ground that all of the questions are equally leading.

Trial Examiner Norwood: I don't think that that would be fair. I think counsel wants to object to the question.

By Mr. MacIntyre:

Q. Mr. Thornhill, I now ask you to state whether or not that when you have changed the destinations
14177 after failure to get bids that were satisfactory to you at one destination, changed the destinations for delivery and purchase of cement to another place, do you

in those cases use the cement at the first or the second destination?

A. At the first destination.

14178 Q. Well, how do you get the cement from the second to the first destination in those cases?

A. That is a matter of an arrangement that we have to make with the requisitioning agency. We are not privileged to change destination without his authority. Then we ask for such authority and he grants it. Then it is his business to get it over to the project.

Q. At whose expense, if you know?

A. Government expense.

Q. That is an added expense to the Government, then, is it?

A. Yes.

Q. I will ask you to state if you can, Mr. Thornhill, what projects you can name,—recent projects you can name wherein you have received only one bid and on which you have made awards under the circumstances such as you have described?

A. I have a recent case there that I brought with me at Pocahontas that was ready for award the day that I left, after sending out the third set of bids and only receiving one bid in each instance.

Q. And what was the—the award was let to whom, or is to be let to whom?

A. Is to be let to the only dealer we have in Pocahontas. I don't recall the name here now.

14179 Q. Well, I show you a file here that relates to requisition No. 6485. I ask you to look at that and see if that will refresh your memory and recollection as to whom.—

A. (Interrupting) Spinnen-Webber Lumber Company, Pocahontas.

Q. Do I understand you to say that is the only person from whom you received a bid on that proposed letting?

A. The only person from whom we received a bid after three successive mailings of invitations for bid.

Q. Have you made any efforts since 1935 to purchase cement for delivery at Berryville, Arkansas?

A. Yes.

Q. With what results there?

A. We let a contract to a man not living in the locality. He was unable to deliver.

Q. Well, under what circumstances did you let the contract to a man not living in that locality?

A. We sent out the bids for cement to be delivered at Berryville and received several bids. The low bidder was the Van Meter Lumber Company, I believe, of Marvell, Arkansas, I believe. I am not certain of their location.

Q. Was that where he had his place of business?

A. I am not certain of the address. At least, he was not at Berryville.

Q. You state he was the low bidder on that project?

A. And was awarded the contract.

Q. What was the date of that project?

14180 A. It was a long while ago. I can't give you the exact date. It is a long while ago.

Q. I show you a file of yours marked "Requisition 352", and ask you to state whether or not that will refresh your memory and recollection concerning the date?

Mr. Zimmerman: In order that the record may be clear I should like to note an objection not only to the question but to the entire line of this testimony as being beyond the scope of the complaint, entirely irrelevant and immaterial as to any issue in the case.

Trial Examiner Norwood: Objection overruled.

A. It was in October, 1935.

By Mr. MacIntyre:

Q. October, 1935. I believe you stated that you let the contract to the Van Meter Lumber Company of Marvel, Arkansas, and they failed to deliver?

A. That is right.

Q. Did you learn why they failed to deliver?

A. They were unable to purchase the cement to be delivered at another locality in which they were not residents.

Q. What did you do then when they failed to deliver the cement?

A. Purchased it against his contract.

Q. From whom?

A. A. L. Handy—I believe that is misspelled—

14181 Hanby Lumber Company, Berryville.

Q. At what price did you purchase from the Hanby Lumber Company in that instance? Was it higher or lower than the price of the Van Meter Lumber Company?

A. Higher.

Q. I will now ask you to look at Commission's Exhibit 2611-A to E and inform us whether there are other dealers located at Berryville, Arkansas, than the Hanby Lumber Company?

A. There are not.

Q. To whom you were advised that cement would be sold by cement manufacturers?

Mr. Zimmerman: Now, I object to that question. That is leading and suggestive and entirely improper.

Trial Examiner Norwood: Read the question.

(The question was read by the Reporter.)

Trial Examiner Norwood: Sustained.

By Mr. MacIntyre:

Q. I will ask you this question, then, Mr. Thornhill—

Trial Examiner Norwood: (Interrupting) Five minute recess.

(A short recess was taken.)

14182 Trial Examiner Norwood: Go ahead.

By Mr. MacIntyre:

Q. Mr. Thornhill, will you please state whether you have made efforts to purchase cement for delivery at Jonesboro, Arkansas?

A. Yes.

Q. Can you state the dates?

A. At the same time that this testimony given in this Berryville case, August, '35, I believe.

Q. I hand you your file, which is marked "Requisition 163" and ask you to state whether you can give us the exact date by refreshing your memory from that file as to the time you attempted to buy cement.

Mr. Zimmerman: Well, is it intended to mark it as an exhibit?

Mr. MacIntyre: Off the record.

Trial Examiner Norwood: Off the record.

(A discussion ensued off the record.)

Trial Examiner Norwood: On the record.

A. October 25, 1935, we purchased the cement from Van Meter Lumber Company.

Q. Under what circumstances did you submit invitations for bids and receive bids?

A. In the regular circumstances of all other bids that we send out. We send out bids to purchase 800

14183 bags of cement to be delivered at Jonesboro, to a number of prospective bidders.

Q. Did you have a low bidder to submit a bid?

A. The Van Meter Lumber Company were the low bidders.

Q. Did you buy the cement from the Van Meter Lumber Company?

A. We contracted with them, yes.

Q. Did they furnish the cement?

A. They did not.

Q. Did you learn why they did not?

A. They were unable to purchase cement for delivery at Jonesboro, which was not in their trade territory.

Mr. Zimmerman: I object to that and move it be stricken out. See, that is a conclusion of the witness that must be based upon hearsay. He was not connected with the concern that was attempting to purchase the cement, and how in the world can such testimony as that be met and how can it be admissible under the hearsay rule?

Trial Examiner Norwood: Did you find out from them why they couldn't? Did they tell you they couldn't ship it?

The Witness: Yes, sir.

Mr. Zimmerman: They would be available as witnesses.

14184. Trial Examiner Norwood: Did they tell you why?

The Witness: Yes.

Trial Examiner Norwood: What was the reason?

Mr. Zimmerman: Well, Your Honor, I object to that as calling for hearsay.

Trial Examiner Norwood: Yes.

The Witness: The reason was that they couldn't; it was out of their territory and the cement manufacturers would not sell them.

Trial Examiner Norwood: I overrule the objection.

By Mr. MacIntyre:

Q. Did you get that information, Mr. Thornhill, in the nature of a report in connection with your official duties?

A. I got it from the Van Meter Lumber Company, yes.

Mr. Zimmerman: Well, I still think that wouldn't take it out of the hearsay rule, and I object to it for that reason.

Trial Examiner Norwood: I think this information came in the due course of business.

Mr. Zimmerman: It wouldn't matter whether it came in the due course of business or not.

Trial Examiner Norwood: He may state it.

By Mr. MacIntyre:

Q. Was it your duty, Mr. Thornhill, to secure a report from the Van Meter Lumber Company after you
14185 made an award to them and they did not ship the cement as to why they did not ship?

A. It is my duty to demand of them delivery, and in demanding of them delivery, that is where the report came from, that they couldn't deliver.

Q. And the reason why they couldn't?

A. Yes.

Q. Mr. Thornhill, I believe you stated yesterday that during 1935 shortly after you set your office up in July and made efforts to secure bids from cement manufacturers you failed.

Now, have you at any time since then submitted invitations to manufacturers?

A. Yes.

Q. Have you received bids?

A. Yes.

Q. During what period of time and on what dates if you can name them?

A. August and September, if I remember correctly, this last year, 1938.

Q. Have you received any bids from cement manufacturers since September, 1938?

A. No. We may have received on in October, one or two in October, but I doubt it, I think September would wind it up.

Q. Did you continue to send manufacturers invitations for bids after September?

A. No.

14186 Q. Why did you discontinue sending them invitations at that time?

A. It was useless. They would not bid.

Q. How did you know that they would not bid?

A. Send them bids and they refused to bid.

Mr. Zimmerman: Well now, if the Examiner please, he has just got through saying that he didn't send any bids since October. He has also just got through saying that he did send them some invitations prior to that and that they did submit some bids in August and September. Now, it doesn't seem to be that we can entertain testimony which amounts merely to the witness's conclusions under those circumstances that they refused to bid.

Mr. MacIntyre: I want the witness, if he can, to clear up the testimony that he has just given concerning the invitations to bid and the bids he received from the manufacturers in September, 1938 and what occurred after that.

Trial Examiner Norwood: Read the question.

(The question was read by the Reporter.)

Trial Examiner Norwood: He answered that, didn't he?

Mr. Zimmerman: Yes.

(The answer was read by the Reporter.)

14187 Mr. Zimmerman: And he also said immediately prior to that that he didn't send any bids since October.

Will you read that, Mr. Reporter?

The Reporter: I haven't got that. Mr. Fincun took that part.

Trial Examiner Norwood: Counsel can bring out any inconsistencies on cross examination.

Mr. Zimmerman: I wouldn't waste time to cross examine on such stuff as that.

Trial Examiner Norwood: Very well. Objection overruled.

By Mr. MacIntyre:

Q. Mr. Thornhill, will you please state whether or not you have, since July, 1935, received bids in response to invitations that you sent to cement manufacturers?

A. Yes.

Q. During what period and on what dates, if you can state?

A. August and September of 1938.

Q. Have you continued to send them invitations and receive bids in response to those invitations?

A. Not since—

Mr. Zimmerman: (Interrupting) There are two questions.

Trial Examiner Norwood: Read it.

14188 (The question was read by the Reporter.)

Trial Examiner Norwood: Objection overruled.

A. No; we discontinued sending them bids.

By Mr. MacIntyre:

Q. Well, did you send any invitations to them after September, 1938, to which you did not receive bids?

A. I am not positive.

Q. Well, why have you discontinued sending invitations to manufacturers for bids after getting those bids in September, 1938?

Mr. Leisure: Now, if Your Honor please, this is not one of the witnesses that counsel has a right to cross examine or to lead. To ask him why he did certain things is certainly cross examination, and his reasons or his motives are not facts in this case. I think we should confine the testimony to facts.

I therefore object to it unless the question is phrased so as to bring out a fact.

Mr. MacIntyre: That is what I was hoping to do.

Trial Examiner Norwood: I asked the witness to make his answer factual. State what in your experience you actually base it on.

Objection overruled.

14189 A. Well, in the—beginning in August and September we had letters from several of manufacturers asking for bids. That is 1938. Those letters are there.

Then the bids then went to the manufacturers and we received bids.

Along in September and the further we got up into the month the less bids we began to receive from manufacturers, and we finally got down to where I believe we could get bids from only one manufacturer.

By Mr. MacIntyre:

Q. What manufacturer was that?

A. I don't remember. And that—if I may go ahead with it—in the office there was a discussion every day with the cement boys that were in there, and the knowledge just come because of sheer necessity to have it, and that they knew it, and this thing has been discussed in our office over and over and over during that time between these boys, and we would jibe at them, you know, about their dealers and so forth, and it is—we knew—when they quit they quit and there didn't have to anybody tell us of it except that we got it from these boys' information. We didn't have to have it from the manufacturers, if you see what I mean.

Q. Did you have reason to believe, judging from the statement you have just made, that you wouldn't get bids

if you did send out any further invitations to manufacturers?

14190 Mr. Zimmerman: I object to that question.

Trial Examiner Norwood: Sustained.

By Mr. MacIntyre:

Q. How many manufacturers did bid during September and the early part of October there?

A. Four or five, if I remember.

Q. Will you name as many of them as you can?

A. You have a file there. It is hard for me to get those names in my mind. I don't handle those details in my office and, naturally, wouldn't remember those names.

The witness identified Com. Ex. 2612 to 2616, inclusive, as abstracts of bids received on the particular projects the witness set out—identified on the abstract. They show the names of the bidders who submitted bids on those projects. They include all the names of the manu-

14191 facturers who bid on these specific projects. He wouldn't recall whether or not any other manufacturers than those appearing on those sheets they submitted any bids to the witness during that period. He wouldn't remember if "we" received others. It is his judgment that they are all quoted here. They are all named on those five abstracts. The witness has the basic date here upon which those abstracts are based.

Mr. MacIntyre: If your Honor please, off the record.

Trial Examiner Norwood: Is this on the record?

Mr. MacIntyre: No.

Trial Examiner Norwood: All right.

(A discussion ensued off the record.)

By Mr. MacIntyre:

Q. Mr. Thornhill, will you state whether or not that the invitations which called for bids on the five projects represented by those five abstracts were different or were the same?

14192 A. They were the—they were the exact same of each abstract. Of course, the amounts would be different on the different—

Q. Yes, but I am talking about the form of invitation.

A. The form of invitation is the same.

Q. The standard provisions were the same?

A. Form 33.

Q. On all five projects?

A. That is right.

The witness identified Com. Ex. 2817 as U. S. Standard Form 33 Revised, which is the form used for invitations for bid and acceptance on practically all of our contracts. That was the form used on all of these five proposals for cement to which the witness received bids as represented by abstracts, marked for identification as Com. Exs. 2612 to 2616, inclusive. There is a little pin note on
14193 there. He doesn't know whether that is on all them or not.

Mr. MacIntyre: If your Honor please, we now offer in evidence the abstracts marked, for identification, as Commission's Exhibits 2613 to 2616, inclusive, and the form of proposal and the bid as shown by Commission's Exhibit, for identification, 2617.

Trial Examiner Norwood: Did you leave out 2612?

Mr. MacIntyre: Yes, we did. It is not offered.

Trial Examiner Norwood: Any objections?

Mr. Leisure: May we see them, please?

(The exhibits referred to were handed to Mr. Leisure.)

Mr. MacIntyre: We would also like for the record to show that we are handing at this time to the respondents' counsel the file of supporting bids and invitations upon which those abstracts are based for their inspection and use on cross-examination or checking of the four abstracts.

Mr. Leisure: Subject to check of these tabulations, your Honor, with the basic data and the invitation form, we have no objection except that the evidence be confined to the companies named in the exhibits.

Trial Examiner Norwood: Anything further?

Mr. Zimmerman: I have nothing to add, no.

14194 (COM. EX. 2613 to 2616, inclusive, and COM. EX. 2617 were offered and received in evidence.)

Cross-Examination by Mr. Leisure.

Q. Mr. Thornhill, you are the state procurement officer? State procurement officer?

A. That is right.

Q. And as such, you are directly under the Treasury Department in Washington?

A. Treasury Procurement, branch of Supply; yes, sir.

Q. Your home office, you have told us, is in Little Rock?

A. That is right.

Q. Arkansas. And does your work cover the entire state, Mr. Thornhill, or do you have another officer—

A. It covers the entire state.

Q. Are you the head of that department in that whole state?

A. Yes, sir.

Q. And it is part of your duties as this officer to purchase supplies and material for WPA?

A. That is right.

Q. And that includes the purchase of cement?

14195 A. Yes, sir.

Q. I think you said a moment ago you do not attend to all the details alone? You are the head of the office? You have a corps of assistants, and you are the head in that section?

A. That is right.

Q. You told us yesterday about sending out certain invitations in 1935 to cement manufacturers?

A. Yes, sir.

Q. I think that was July, 1935, was it not?

A. I think it would show that I said July or immediately following the month of July.

Q. Very good. Now, those invitations, are they—would you mind just describing the machinery of how you proceed? Are they on printed forms that you fill in on a typewriter, the invitations which you send out to manufacturers?

A. Yes, the forms contain all the conditions surrounding the contract.

Q. And are those printed invitations? Are they prepared in your local office or do you get them from somewhere else?

A. No, we prepare them in our office. Of course, we receive them from the Washington office, the blank forms.

Q. The printed forms?

A. Yes.

Q. That is what I am trying to get at. You fill in the amount of cement required with a typewriter in the

14196 printed form, and the addressees—

A. Specifications.

Q. The addressees?

A. Specifications, and so forth.

Q. The addressee, the manufacturer to whom you send the invitation?

A. Yes, sir.

Q. When these invitations are filled out, as I have described, and meaning, of course, your office—I don't mean you personally typewriting them—they also fill in the name of the particular manufacturer to which you are sending the particular invitation?

A. That is right.

Q. And those are to manufacturers serving your territory?

A. That is right.

14197 Q. And your office—just so we may have this machinery clear as to how it operates—your office has a list of the manufacturers serving your territory, and from that list you fill in by typewriter the names of the addressees and it is mailed by your office to those addressees, is that correct?

A. Yes. We have the file set up,—the prospective list file set up.

Q. Yes. And from that list of the manufacturers serving your territory they fill in on this printed form the manufacturers they are mailing these invitations out to, is that correct?

A. That is correct.

Q. Now, further as to the machinery; when you send it out do you send out the carbon copy or do you send out the original?

A. We send the original with three copies.

Q. With three copies. And do you send one carbon copy to Washington or do you keep it there in your office?

A. We keep it in the file, if I remember that. The signed contract, when it is finally made, that is the one that we send a copy of to Washington.

Q. That goes to Washington?

A. Yes.

14198 Q. But as to the invitation, when you send out the three, the carbon of that invitation you keep in your office and do not send to Washington; is that correct?

A. I believe at this time that we send a copy of every bid to Washington. I don't think at the time that you are covering there that we did.

Q. You think you merely kept them in your office and did not forward them to Washington?

A. I am not positive about that, but I think that is the case.

Q. You are positive, however, that there came a time when you not only kept them in your office but you forwarded them to Washington?

A. That is right.

Q. So is it correct to say that there may have been one period of time where you merely kept the copies and did not forward them to Washington, and there came a time when you forward some of them to Washington? Would that be a fair statement?

A. You are speaking now as to the invitations for bids?

Q. I am talking about the invitation.

A. Invitation for bids?

Q. Merely trying to get the machinery described.

A. Yes, I think that is correct.

Mr. Leisure: Now, there was an exhibit here offered yesterday of the dealers' list. May I have that, Mr. 14199 MacIntyre? I am now referring to—

Trial Examiner Norwood: (Interrupting) 2611.

Mr. Leisure: 2611-A to E.

(A document was handed to Mr. Leisure.)

By Mr. Leisure:

Q. May we get just a little further description on the machinery, Mr. Thornhill?

Have you ever purchased or attempted to purchase from every dealer named on the list?

A. I am not certain about that.

Q. You are certain, are you not, that these dealers are dealers representing your territory only? I mean they are dealers only in your State; they don't go outside of that territory?

A. Well, there might be some in Texarkana or in Fort Smith, even, that might bid on some Texas stuff if they are in that particular territory.

Q. Does your territory cover more than one state?

A. No sir.

Q. These dealers are intended to cover the territory in which you serve?

A. That is the purpose of the list, yes sir.

Q. So, as far as you know, these are what might be described as the Arkansas dealers on this list?

A. That is correct.

14200 By Trial Examiner Norwood:

Q. Would you send an invitation to a dealer outside of the State for delivery in the state?

A. I could send bids, Judge, yes sir.

By Mr. Leisure:

Q. Following up His Honor's question, these here, however, as you understand it, represent the—are the dealers to whom the different manufacturers sell in the State of Arkansas?

A. That is correct.

Q. And as I understand you to describe it both this morning and yesterday, this list was not given to you by any one person; it represents a period of time in which there was a compilation made of different dealers. This wasn't all written up at one time?

A. That is correct.

Q. And after these different salesmen that you have described gave someone in your office the names of the dealers to whom they sold it was then the duty of somebody else to typewrite them on this list and bring it down to date as you did it, is that so?

A. Yes, that is correct.

Q. And that is the way you got the compilation of the complete list?

A. That is right.

14201 Q. By bringing it on down to date?

A. That is right.

14202 Q. I think you have told us—you have told me already on cross-examination that you didn't write this document all at one time. Whenever a new salesman, just as you have described—and I don't mean new in the sense of being in your territory for the first time; I mean when you first asked the question—whenever a salesman gave you some additional names, they would be taken down in some way and transcribed to this list?

A. Yes. The answer to your question will be found in that some of those are typewritten or penciled in there which have come in later.

Q. Some of these I notice are in pencil. Does that indicate that you add the name of a dealer because of a salesman who will say "We have a dealer here at
14203 such and such town" and then you would add that name, is that correct?

A. That is correct.

Q. That is the way, is it not, that this entire list is made up? The compilation was made not from any one dealer but from different dealers, isn't that true?

A. That is correct; and I might say from requests—

Q. (Interrupting) I mean different salesmen, Mr. Reporter, where I said "different dealers".

A. That is right, and from requests of different persons themselves or the concern itself. He may write in and ask that he be given bids on any contract we send out. If I have a request from a man in San Francisco to bid on that I have no authority to deny him. I send it to him.

Q. So that we may have it definitely, when different dealers give you names as you have described,—different salesmen give you names of their dealers, as you have described, those were made part of this compilation from time to time, and if a dealer wanted to be on your list he might write in, is that correct?

A. Yes, that is correct.

Q. And you would feel it your duty to include his name on the list?

A. I would know it was my duty.

Q. And it was put on the list?

14204 A. Yes.

By Trial Examiner Norwood:

Q. In that case would you find out whether or not this dealer represented a manufacturer who could supply?

Mr. Leisure: Now, if Your Honor please, I would like to finish my cross-examination, if I may.

Trial Examiner Norwood: Counsel will have ample time to finish his cross-examination.

Answer my question.

A. Ask it again, will you please?

Trial Examiner Norwood: Read it.

(The question was read by the Reporter.)

A. Yes.

14205 Mr. Leisure: Now, if your Honor please, before I continue with my cross-examination, I would like to make certain motions that I think have been made before, but I want to be sure that they are on the record with regard to the witness' testimony, and we will give

14206 your Honor the lines, if you desire them.

With regard to his testimony respecting these invitations, I ask that it be stricken out because it now appears that the invitations are in writing and they are on

file in his office, and for that reason I submit that the best evidence are the invitations themselves.

As to the addresses to which he tried to remember what manufacturers he sent the invitations to, it now appears that there is a list in his office from which the addresses were taken, and they were forwarded to those addressees, and that being in writing, I move to strike out his testimony on that point because it is not the best evidence.

Trial Examiner Norwood: Does counsel contend because there is a list somewhere of these names, that this witness couldn't give them from his own memory, if he can?

Mr. Leisure: Well, I think what we are entitled to have, particularly when a government witness is testifying, is to have a complete record as to what was done, and that list of manufacturers which he has in his office is a far better record than his memory as to whom he sent invitations, and I think we are entitled to that. And so,
14207 too, as to the invitations, I think those invitations are far the best evidence rather than his memory as to what he did with the invitations.

I am objecting to the testimony and asking that it be stricken because it is not the best evidence, and the best evidence has now been shown to be in existence.

14273 F. E. TYLER, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am President of the Dewey Portland Cement
14274 Company and have been since its inception in 1907. One of the mills of the Dewey Company is located at the outskirts of Dewey, Oklahoma, and the other one is located about eight and a half miles west of Davenport, Iowa, at a little town by the name of Linwood. We started building the Dewey plant approximately the 1st of January, 1906. It was completed and we started shipping cement in February, 1907. Referring to the Davenport plan, so called, although perhaps I should say Linwood plant, we started building that about the first of January, 1926, and we started shipping cement in June, 1927. The maximum capacity of the Dewey plan would be, approxi-

mately, 1,500,000 or 1,600,000 barrels a year, and the Davenport plant about 1,700,000 or 1,800,000 barrels a year. Most of the output would be shipped within 400 miles of
14275 the Dewey plant in every direction. That includes some portion of Texas, some portion of Arkansas, some portion of Missouri, practically all of Oklahoma, all of Kansas, portion of Nebraska, small portion of Colorado and perhaps I have forgotten some territory, but I don't think so. Dewey gets a very small amount in New Mexico. It is a little difficult to state how far south into Texas Dewey goes. I would estimate practically never more than a couple hundred miles south of the southern line of Oklahoma. We go much farther south than Dallas and Fort Worth and we have sold some small amount of cement in Dallas, Texas, because, unless I am mistaken, they are within some 100 or 125 or 150 miles of the southern line of Oklahoma. So it is easily within our 200 mile distance. All the distances are bound to be approximate.
14276 Dewey makes something other than standard Portland cement. It makes high early strength cement. It also makes other products which are entirely apart from cement. Any product we make we ship any place we can. The territory that the witness outlined is for the sale of standard Portland cement, and generally speaking, for all other products that we make. We ship very little in Colorado, and maybe some years not at all. There is a reason for that, of course, and that reason being that the freight rates are so high that it is almost impossible to reach the State of Colorado.

Q. Your delivered prices would be very high in
14277 Colorado, would they not?

A. Delivered prices, yes sir. That is, at times they would be high. At times they would be low, depending on—

Q. (Interrupting) They would be higher than your delivered prices near your mill, wouldn't they?

A. Yes sir, always.

Q. Are those high delivered prices less profitable to your mill than the low delivered prices?

A. I would say that wouldn't always be true.

Q. Generally true?

A. Yes, generally the farther you stretch out—

Q. (Interrupting) The farther you go the less profitable it is, is that right?

A. Generally speaking, yes sir.
Q. Is either of your plants a basing point?
A. No sir.
Q. Have either of them ever been?
A. Yes sir. The Dewey plant was a basing point in—well, I have just forgotten the year. And what I mean by basing point, I want to make that clear because it is proper,—that there was a price there for a period of about a year that was a maximum net that we could get for cement.
Q. Was it put there by your company?
A. Yes sir.
Q. Did any other company ever put in a base
14278 price at your mill?
A. No sir.
Q. What year was it that you refer to?
A. I am just not positive of the year. Of course, the records will show. It seems to me that it was in 1931,—1931 or 1932, perhaps.
Q. What caused you to put in a base price at your Dewey mill and not at Davenport?
A. At the time that we established this maximum net at Dewey, Oklahoma, the prices were so terribly demoralized in all directions that although the—considering the way freight rates apply to the Dewey plant we only serve a very small area. We felt that we wanted to make the price just as low or lower there so that we wouldn't create sort of a little oasis, so to speak, for other companies to try to get business.
Q. You mean you wanted to put it so low that other companies couldn't afford to come into that territory?
A. Not exactly that. We didn't want to have this very small area with a very small consumption of cement—that we didn't want to have some little spot there that would be attractive to the other fellow because everybody, literally speaking, had a war on prices.
Q. What is the difference between what you stated
there, that you didn't want to have a little oasis that
14279 would be attractive to the other fellow, and what I suggested about putting your price so low as to keep the other fellow out?
A. That would be easy enough to do, I guess, if we would sell it cheap enough; if we would sell it cheap enough the other fellow would never come in.

Q. What is the difference between the way you stated it and the way I put my question?

A. I guess I don't understand your question. I know what I meant but maybe I don't know what you meant.

Q. I understood you to say that you put the base price in at Dewey in order to create a little oasis there.

A. In order not to create a little oasis. In order not to create one.

Q. I see. Create a little oasis there in which it would not be attractive for others to come in?

A. For other companies. That is, not be so attractive, that we created this maximum net. It would reduce the prices over a very small area on account of the way freight rates were made in the so-called gas belt.

Q. What is the difference between that and what I suggested, that you made a base price there that made it unprofitable for outside mills to come in?

A. I am not considering the profit in any answer that I make. Not considering profit or loss in any answer that I made.

14280 Q. What led to the discontinuance of the base at Dewey?

A. As business became some better later, some few years after that, there was an opportunity to secure more money for cement, we eradicated the base in order to get the small benefit,—didn't amount to more than some $1,500 or $2,000,—from our geographical location.

Q. Do you mean by that that you discontinued your base there in order that you might gain the additional benefit of adding the freight from the applicable basing point to your nearby customers?

A. No sir, I don't mean it in that way. There are so many factors come into—

Q. (Interrupting.) If you don't mean it that way—I thought that was the purport of your answer before.

A. Well, to some extent it is, yes. The principal point that I made in my answer was that we decided to take off this so-called maximum, so-called base or this maximum net price so as to be able to get a couple thousand dollars or more for the cement in this little bit of an area.

14281 Q. And that amount, whatever it was, consisted, didn't it, or was measured by the amount of freight from the basing point that you then used to your nearby area?

A. Not necessarily, Mr. Wooden, for the reason that, to my mind, the so-called basing points are nothing but misnomers, or nothing that we should depend on at any time as to what the price is at the market or destination.

Q. After you discontinued the base at Dewey, did you base on some other points?

A. No, sir.

Q. What did you do?

A. The Dewey Portland Cement Company have never had but one policy in the 32 years that I have been the head of the company, so to speak.

Trial Examiner Norwood: Off the record.

(A discussion ensued off the record.)

By Mr. Wooden:

Q. Now, Mr. Tyler, don't you recognize such a thing in the industry as basing points and non-basing points?

A. No, sir, I do not.

Q. Pardon?

A. I do not.

Q. Did you read the testimony of your Mr. Capen in Chicago last month?

A. Mr. Capen?

14282 Q. Yes.

A. Yes.

Q. Do you recall his testimony about the instructions he had in quoting delivered prices to use the base point plus freight from the basing point?

A. I remember reading the abstract of Mr. Capen's testimony. I don't know that I subscribe to it entirely, although maybe I do. I don't remember—I don't know just what you refer to, but the answer that I was starting to make, Mr. Wooden, I would like to continue, and that is—

Q. Well, now, I will just have to—

A. You asked me a question. I have to make an answer.

Q. I don't think there is any answer pending.

A. Well, I was just going to answer.—

Q. You will have plenty of opportunity—

A. I was making an answer to the Examiner.

Mr. Wooden: You will have plenty of opportunity to make a statement.

Trial Examiner Norwood: Read his answer.

(The answer was read as follows:)

"The Dewey Portland Cement Company have never

had but one policy in the 32 years that I have been the head of the company, so to speak."

Trial Examiner Norwood: Do you wish to make any further answer?

14283 The Witness: Yes, sir. That is what I wanted to do, make a further answer.

Making always an intense investigation as to what cement is selling for at the market price at destination, and then getting as much money as we could for it considering that price.

By Mr. Wooden:

Q. When you submit bids on state highway business, do you make a special investigation to find out what the delivered price is at every destination the state wants deliveries to before you submit your bids?

A. Yes, sir; we follow identically the same policy whether there is one city or thousands of cities. That is a policy that we have been following all the time, what I would call a constant policy, and that is that it may be a policy one day and on account of the intense competition in the business, we may have to change the policy the next day.

Q. You figure back to find out what basing prices are from such information as you can get about delivered prices?

A. If after we see what others have quoted at destination—

Q. At certain destinations?

Mr. Zimmerman: Let him answer.

A. We could figure back to freight and find out what the maximum net would have been for some company at some other place.

14284 By Mr. Wooden:

Q. And then after you find that out, then do you add the freight from that company's mill to destination?

A. We do not. We do just the reverse, Mr. Wooden. Instead of starting at what you call the base point, and I call it—I will again say that it is nothing but a misnomer—we start by finding out the price at destination first and then regardless of the base, because there is no telling where the prices would come from, they don't necessarily come from a base point at all. They may come from many other mills that don't have a so-called basing

point. We go back—we trace it from the destination point back rather than starting at any base point and making a price.

Q. But unless you were figuring back on a base point mill, you would never get any common price, would you, from different destinations? You would get a long string of variations that wouldn't mean anything from a non-base point mill, wouldn't you?

A. Well, Mr. Wooden, I don't know what you would mean by a common price, but very much of the time this business has no common price.

Q. Well, I mean simply where the same mill net repeats itself to the same mill regardless of destination.

A. It could be true.

14285 Q. Yes.

A. That some mill, speaking for the Dewey mill, that I feel that I am qualified to talk about—

Q. Yes.

A. —and not anybody else's mill—

Q. You wouldn't—

A. It is true that—

Q. You wouldn't have any—

A. It is true that—

Q. —any common price at your mill, would you?

Mr. Zimmerman: I think the witness ought to be permitted to answer.

A. It is true—

Trial Examiner Norwood: Let the witness answer the questions.

A. It is true, Mr. Wooden, that there would be times where we would ship the cement, when we would get the same maximum net for it one time or another, but I will state again that we have never in 32 years had anything but the policy of finding out the price at destination and then doing the best we could to make some money.

By Mr. Wooden:

Q. Showing you Commission's Exhibit 2165-A, B, C and D, would you say after looking at that, that the Dewey Portland Cement Company did not use basing points

14286 and basing point prices in submitting their bids to the State of Illinois in 1933?

A. Mr. Wooden, I will have to be excused from testifying pertaining to that for the reason that it is not a matter that I handled in any respect.

Q. Well, your Mr. Capen handled it?

A. Yes, sir, but it is a matter that Mr. Capen should make the answers to.

Q. And he did.

A. Yes. If you have the answers from Mr. Capen, I have nothing to add or to subtract from it. I am not familiar with it.

Q. Now, look at Exhibit 2166-A to D. Do you say that the Dewey Company didn't use basing points or basing point prices in submitting those bids to the State of Illinois in March, 1933?

Mr. Leisure: I think the witness has testified he is not familiar with it. I don't see how we can get him—

The Witness: Mr. Wooden, I am not—

Mr. Wooden: He ought to be. He professes to be.

The Witness: I am not familiar with it.

Mr. Wooden: He professes to be familiar with the business.

The Witness: I am not familiar with it, Mr. 14287 Wooden.

Where you and I are going to disagree all the time is that I don't—I claim that we do not use basing points to start with, but that we have reason to believe and investigate all the time and find the points at destination.

By Mr. Wooden:

Q. Do you mean to say that referring to Exhibit 2166-A to D, inclusive, that you found out what the delivered price was of each of those destinations before you submitted a bid?

A. I don't know what investigation Mr. Capen made, and I am not familiar with it. I might not even have been in the country at the time. I am away quite a little, and I know, of course, that we bid on various states over there, and that is practically all I know about it.

By Mr. Wooden:

Q. Why is it a misnomer, Mr. Tyler?—

A. Beg your pardon?

Q. Why is it a misnomer—wherein is it a misnomer to refer to basing points?

A. For the reason that where this one mill having this so-called basing point, there is a lot of mills that don't have a basing point, and if it were true, and I deny that it is with the Dewey Company—

14288 Q. You deny what?

A. I say, if it were true, and I deny that it is true with the Dewey Company, that we go back to basing points.

Q. I thought you had a—

A. You will find that very much of the time from a mathematical standpoint, that the basing point and the freight added, and so forth, what I assume you had in mind, that wouldn't be the price at destination at all, and yet we meet the price at destination which considerable of the time is not the freight and the bags, and so forth, on top of the basing point.

Q. Sometimes the price at destination, in other words, is cut; is that what you mean?

A. Sometimes it will check back to the mills getting a certain maximum net, that is true.

Q. I don't yet understand wherein the term "basing point" is a misnomer. You say it is. Now, tell us where or how it is.

A. May I ask you a question as to whether the basing point signifies the price at destination with the freight and the bags and the discount added?

Q. I am not referring to what it signifies, but I am referring to the term as used in the trade. You are familiar with its usage, aren't you?

A. But, Mr. Wooden, I don't mean to be dis-
14289 courteous, but I am referring to what you signify, which is not the basis of the Dewey Portland Cement Company doing business on.

Q. Can't you tell us wherein the term "basing point" as used in the trade is a misnomer?

A. Well, it came about through customs and was called that and people would—

Q. Wherein is it a misnomer?

A. —would call it that, that on the basis that you would call a horse "chestnut", a chestnut horse, or something like that, and certainly it would be a misnomer.

Q. I am asking you to explain wherein it is a misnomer.

A. Well, I say because the base means bottom, as I understand it, which is not the bottom price at all, and in that respect, if nothing else, it is a misnomer.

Q. As a matter of fact, the base point price is maximum price, isn't it?

A. That is what it is.

Q. Yes.

A. Absolutely. It is the maximum price.

Q. Oh, you think base price may be one thing and basing point another?

A. It is the maximum price, but it is not the bottom price.

Q. Well, you are defining base as bottom. I asked you wherein the term "basing point" was a misnomer, not what base or wherein "base" was a misnomer or

14290 "base price." I asked you "basing point."

A. I will be glad to make this explanation, which I think is one that I made before: if I was to apply a basing point in a way that I assume you have in mind, much of the time it wouldn't be the price that the Dewey Portland Cement sells cement for at that station, and, therefore, it is not a basing point, and at much of the time, as far as the Dewey Portland Cement Company is concerned.

Q. Do you recall an interview with you by a representative of the Federal Trade Commission in 1933 by the name of Charles M. Johnston?

A. No, sir.

Q. Do you remember there was—

A. I beg pardon?

Q. Do you remember there was a call from some representative of the Commission in 1933 upon you?

A. No, sir; I never heard of Charles M. Johnston.

Q. Will you state whether or not you ever told any representative of the Federal Trade Commission, in 1933, that neither of your mills had base prices?

A. No, I don't recall making any statement.

Q. Do you recall whether or not you ever told any representative of the Federal Trade Commission that your company over a period of thirty years had never taken the lead in setting prices?

14291 A. No, sir, I don't recall that.

Q. Do you recall ever having told a representative of the Federal Trade Commission that it was generally the large chain companies that set prices?

A. No, sir; I don't recall making no such a statement.

Q. Did you ever tell any representative of the Federal Trade Commission that you merely followed the prices set by others?

A. No, sir; I can't conceive that I would say that because I know now I would—I know now and I would have known then that it was absolutely incorrect.

Q. Did you ever tell—strike that.

Does your company use the freight rate books of the Cement Institute?

A. No, sir.

Q. Do you subscribe for them?

A. Well, we were members of the Institute, and I really am just at a loss to say whether we subscribe to them or not. I don't think so for the reason that we have always been quite proud of our own freight rate department, and we have always had one ever since the inception of the company, and we haven't consulted any books but our own, as far as I know.

Q. In what period of time?

A. Since the 32 years.

14292 Q. Do you know whether or not your company has had in its offices the freight rate books of the Cement Institute?

A. I really don't know.

Q. Well, you are head of the company, and don't you know on a point like that whether you take this service with the Cement Institute?

A. If I may be permitted to answer, I have been one of these fellows that carried quite a load on everything. I don't claim to be a traffic manager; I don't claim to be a sales manager; I think I would qualify nearer as being some one that would be a pretty good superintendent of a cement plant rather than I would a lot of these other things.

Q. Well, you know your company uses delivered prices, I take it?

A. I know that we make—

Q. Make delivered prices?

A. —destination prices in the way that I have already described; yes, sir.

Q. Yes.

And, of course, that includes freight rates?

A. Yes, sir.

Q. Yet you are not sure whether you have used in any way the freight rate books of the Institute?

A. It could be true, being they would be available, and I would be glad to give an answer to that from our

14293 traffic man to suggest what use we ever made of them, if any, but I do absolutely know that we compiled our own freight rates in the 32 years.

Q. Who is your traffic manager?

A. Mr. R. W. Moore.

Q. I take it, you haven't seen any necessity, then, for having the freight rate books of the Cement Institute?

A. I wouldn't know of any, not from my knowledge.

By Mr. Wooden:

Q. You think your own traffic department and its compilations are sufficient for your purposes?

A. Yes, sir, absolutely.

Q. Do your salesmen carry any price books of any sort?

A. Yes, sir.

Q. What are they like? What are they?

A. They are little books about that wide and about that long (indicating), and in a territory—

Q. Pocket size, you might say?

A. Yes.

Q. Loose leaf?

A. They are little loose leaf—there is approximately 30 towns on each page, and a price is given to each one of these towns that he is supposed to ask the dealer for cement.

14294 Q. How is the delivered price at each of those towns calculated?

A. On the basis of what we feel is the competitive price at the market place, or at destination.

Q. And is that delivered price ordinarily the mathematical equivalent of the freight from some point other than your own mill?

A. Sometimes it is and sometimes it is not.

Q. I meant the mathematical equivalent of freight plus a maximum net from some point other than your mill.

A. That would be true at times, yes.

Q. Is that generally the case?

A. In numbers of points, it might be in the majority of cases; in a volume of cement, it might not be.

Q. It might not be?

A. And isn't very much of the time.

Q. Do you make it a policy to try to make destination, your destination prices, the same as that of your competitors at given points?

A. We make it a policy to endeavor never to make them any higher, because if we did, we would never get any business.

Q. You make it a policy not to make them any lower?

A. Certainly. We don't try to sell cement at less than what we feel our competitors are selling it for. If we did, that would be something that would become known immediately, and that would be the price.

14295 Q. There are some places, are there not, where you have a material advantage in the delivery of cement to certain points, are there not?

A. It just so happens that, Mr. Wooden, speaking of Dewey, Oklaboma, that that isn't true.

Q. Well, aren't there some points where you have a material advantage?

A. Yes, a very few points, but I understood you to speak of it rather in the matter of volume or material advantage in quite a territory.

Q. Even at the points where you have an advantage you do not wish to make your delivered prices any less than that of your competitors, is that right?

A. Where we have this little advantage at Dewey, Oklahoma, that I speak of, we take advantage of our geographical location when we can.

Q. And in taking advantage of it you don't make your delivered prices any less than that of competitors who have a disadvantage?

A. Any less? No sir, we do not. We don't make them any less.

On the other hand, where we have, you might say, thousands of disadvantages, why, we meet their prices where we have the disadvantages too. That is, we meet them at destination the way I described, or try to.

14296 Q. Your destination prices are intended to be the same as your competitors' destination prices regardless of whether you have an advantage or disadvantage to the particular area?

A. Not always. Very often that we find the prices are entirely different than we think they are after we bid on jobs or try to get them, and I have reason to believe that the other fellow probably has reason to believe that the Dewey Company has probably slipped at times and made lower prices than they thought was the current price on the market.

Q. Sometimes that happens by accident, doesn't it?

A. By accident?

Q. Yes.

A. Well, it could either happen by accident or design, either one of the two.

Q. In the computation of destination prices are there accidents or errors likely to creep in?

A. Of course, I admit that anyone is apt to err.

Q. The more calculations they have to make the more likelihood of error, isn't that right?

A. I presume so.

Q. Has your company ever made erros, unintentional errors in calculating its delivered price?

A. I have no reason to believe but that we make errors every year.

14297 Q. In calculating your delivered prices?

A. I presume so, yes.

Q. Do you recall whether or not you ever told a representative of the Federal Trade Commission that, regarding these price books that you have described, that the destination prices are changed when freight rates are changed?

A. No sir, I don't recall that.

Q. Do you recall ever telling a representative of the Federal Trade Commission that the destination prices were changed if base prices were changed?

A. No sir, I don't recall that.

14299 Q. Do you recall a visit by Mr. John H. Bass, representing the Federal Trade Commission, during 1936?

A. Yes sir, I think I recall of his being in the office a couple times, and we talked about different celebrities, is the reason I perhaps remember him a little better.

Q. Did you ever tell Mr. Bass or show Mr. Bass how your delivered prices were made up at certain points?

A. I don't recall of his asking.

Q. Do you recall telling him or showing him, if he asked or not?

A. If I did not recall his asking I don't think I would recall making the statement, so I don't think I made the statement.

Q. Do you remember whether or not, in showing him how you made up your delivered prices you consulted and showed him the freight rate books of the Cement Institute, or any of them?

14300 A. I don't recall his asking me.

Q. Will you state whether or not you ever told Mr. Charles M. Johnston, representing the Federal Trade

Commission, or any other representative of the Federal Trade Commission that you had established your mill at Davenport in order to take advantage of competitors' prices?

A. Will you please read the question?

(The question was read by the Reporter.)

A. No sir; I don't remember of any such a question as that being asked at all, and I must say again that something very decided would have to come before me in order that I would remember ever of hearing of Charles M. Johnston.

By Mr. Wooden:

Q. Will you state whether or not you ever told Charles M. Johnston, or any other representative of the Federal Trade Commission, that you couldn't recall an instance in 30 years where your company had set the price?

A. No sir, I don't remember of any such a conversation as that at all.

Q. Is that a fact?

A. What do you mean by setting the price, Mr. Wooden?

Q. Initiating a change in price.

A. In what?

Q. Initiating a change in price.

A. Oh, I would be surprised in a period of 30 years if the Dewey Portland Cement Company,—if Dewey Company didn't, between both Dewey and Davenport, make many prices that was perhaps lower than our competitors would make.

14301

Q. You mean intending to change the market price, or whatever you call it?

A. Well, yes.

Q. Can you give any instances, or on inquiry at your office can you give any specific instances?

A. Unless I am mistaken.

Q. Let me finish my question, please.

A. Unless I am mistaken, Mr. Wooden, after we built our Davenport mill, that we made destination prices around in some few cities there that you might say was the result of the Dewey Portland Cement Company. I am not certain about that, but I say that I am quite correct.

Q. As President of the Company you must know of the general policy of the company. Has its policy been one to be a leader in changing prices or has it been a follower?

A. Well, of course, we are a small company and from the standpoint of my saying that we have set prices over some vast territory that were lower than others were making, why, I don't suppose we have.

Q. You don't suppose you have?

A. No sir; but I am speaking in a very general way and over a large territory.

14302 Q. Will you state whether or not you ever told Charles M. Johnston or any other representative of the Federal Trade Commission that if f.o.b. mill prices were adopted that your Davenport mill could sell only in a much more limited area than it now sells?

A. No sir, I don't remember any such conversation.

Q. Is that a fact or is that your opinion?

A. Ask me the question now as to what you mean when you say "is that a fact." What is the question?

Q. It is your opinion that your Davenport mill would have to sell in a much more restricted area than it now does if it sold f.o.b. mill?

A. Why, no, not at all. That is always a matter of conditions and prices and taking the whole country into consideration and the price that would be made and the destination prices of others and all that. There is no way you can say "no" or "yes" to a question like that.

Q. Do you think it is possible, then; that mills selling f.o.b. might sell in just as wide an area as they do now under the delivered price system?

A. If they would make a price low enough they could certainly increase the territory they would reach, if they would make the price low enough.

Q. They would have to make it lower in the same territory, wouldn't they?

14303 A. If you would sell cement for ten cents a barrel I imagine you could reach a pretty wide territory.

Q. You would have to make a lower price in order to hold the same territory, wouldn't you?

A. A lower price?

Q. Yes.

A. In order to hold the same territory?

Q. Yes.

A. No. The lower prices you would make the more you would expand your territory, provided your competitors

would stand by and let you take the markets, which they won't do.

Q. You think, then, that f.o.b. mill selling would lower the prices obtained by mills?

14304 A. Well, there are so many things to think about in that. The matter of the—where your customers would be would be one item to consider, the territory you could cover, the location of the mill. It could very

14305 easily be true that someone representing some company could say "yes" to that question and someone else say "no" to it and both be correct.

By Mr. Wooden:

Q. How about your company?

A. The making of an f.o.b. mill price would lower the price of cement?

Q. Yes. At your mills.

A. How can there be more than one obvious answer to that, by saying it would all depend on the price that you would make.

Q. I am asking you whether or not one of your grounds of opposition to any suggestion of f. o. b. mill selling—

Mr. Zimmerman: (Interrupting) I object to that because the witness hasn't stated any opposition to it at all. That isn't what this case is all about.

Mr. Wooden: I can ask him that first.

Trial Examiner Norwood: Objection sustained.

By Mr. Wooden:

Q. Are you opposed to f.o.b. mill selling?

Mr. Zimmerman: I object. It is not a proper question under the issues in this case as to whether he is or is not opposed to f. o. b. mill selling. There is no charge in this complaint under which that would be justified.

14306 Trial Examiner Norwood: He can tell what the policy is of his mill. He can do that.

Mr. Zimmerman: That is all right. Ask him what he does do.

Trial Examiner Norwood: Objection overruled.

A. I can repeat again, Mr. Wooden, but it goes back to an answer I made approximately an hour ago as to the policy of the Dewey Company for 32 years.

By Mr. Wooden:

Q. I am asking you if you are opposed to f.o.b. mill selling?

A. It wouldn't be commercially possible.

Q. You are opposed to it?

A. To operate our mill on any basis except to find the prices at destination in order to hold our dealers and in order to have business. It wouldn't be commercially possible. In other words, if our price was high on any basis we would be out of business.

Q. It would be less profitable to sell f.o.b. mill?

Mr. Zimmerman: That is just continuing the argument.

Trial Examiner Norwood: I think so.

A. Not necessarily. I think there are so many factors in connection with the question, Mr. Wooden, that I just can't say "no" or "yes" to your question because
14307 I would be making an answer that wouldn't be a fact.

By Mr. Wooden:

Q. Did you ever tell Charles M. Johnston or any other representative of the Federal Trade Commission that selling f.o.b. mill, one mill would have a lower price where its freight rate governed and another mill a lower price where their freight rate governed?

A. No sir; I don't remember anything of the sort, and, of course, if he would have asked me that question I couldn't have said "no" or "yes" to it because either answer would be a silly one.

Mr. Zimmerman: May we have a brief recess?

Trial Examiner Norwood: Yes.

By Mr. Wooden:

Q. Did you ever tell Mr. Johnston or any other representative of the Federal Trade Commission that selling f.o.b. mill would restrict your Dewey mill to a small area of a comparatively few villages?

A. I don't see how I could have possibly told him that because that would all depend on what prices we were making, again. If we would sell it cheap enough we could sell it a long ways.

14308 Q. Mr. Tyler, I am showing you Exhibit 2175, being a letter which Mr. Capen identified as received from you, dated March 9, 1931, and directing your attention to the fourth paragraph of that letter.

Have you read it?

A. Well, the fourth paragraph, yes, but I wanted to get the gist of the thing up above.

Yes, I think I have it. That is in 19—

Q. (Interrupting) 1931.

A. 1931, yes sir.

Q. What do you mean by the language where you said you were clearing getting over a million barrels contracted—

A. Yes, sir.

Q. —"As it could be true that some of the immensely rich companies would put in a very low base, and perhaps at Davenport or some other place"?

A. Yes.

Q. What was the low base you were referring to there?

A. I didn't refer, of course, to any certain base, Mr. Wooden. That is 1931. Mr. Capen had only been with us a short time. He was just facing for the first time in his entire career in the cement business an immense fight among cement companies where prices were down so low that all companies were losing an immense amount
14309 of money, and being the prices were so low, I gave him, so to speak, advice to not load up, because if prices went down so low that we would suffer badly, we would suffer badly on account of losses that we would incur.

Q. My question was, however, what did you mean by the expression that it was a very low base?

A. Well, a base that would cause a very low price at the destination points where we had customers or where we would be selling that would cause that price at destination.

Q. Do you think the word "base" was a misnomer in your letter there?

A. Yes, sir, the same as I had said before, for the reason that we don't apply it only at destination, Mr. Wooden, and never have in 32 years, and never with any sort of business.

Q. Well, what were you afraid of there, the very rich companies putting in a very low base?

A. Exactly this, Mr. Wooden, that if cement was selling at a profit, I would be very much pleased to have Mr. Capen have a million barrels contracted, but if cement is selling at 40 or 50 cents a barrel loss, I would certainly feel that it would be a terrible judgment on his part, and I so advised him not to load up, because if prices went still lower, that we could lose half a million dollars, and we don't want the business if prices were cheap enough. We

would certainly avoid taking it as much as we can.
14310 While the prices are going at a profit, we certainly try to sell it. That is nothing but what I call—

Q. You don't seem to appreciate that I am directing your attention particularly to the words "Very low base" and asking what you meant by a base.

A. Well, how would I know but what inasmuch as it has been done in some two or three instances that I have heard testified here to, that some company would put in the maximum price that we could secure at Davenport? How would I know but what they would do that?

Q. Is that something to be feared?

A. It is something to be feared?

Q. Yes.

A. I don't remember whether I just had that form in my mind or not, but I did have at least something the equivalent of that, that we might have a lot of cement sold and then have to ship it and lose 50 cents a barrel.

Q. What was the fear of having a base put in or a maximum price put in at your mill based on? What is the ground of a fear of that sort?

A. Well, because of the fight on among the cement companies at the time that letter was written, that the prices were demoralized all over the whole section that I know of surrounding Dewey and Davenport, and that simply is what I call business judgment on the part of any man that
14311 even thinks he is a business man, that he wouldn't want to sell a million barrels of cement at a time when he knew he was going to lose an immense amount of money.

Q. By having a base put in at his plant?

A. Regardless of the base, whatever it yields you, whether the base was put in by somebody else, or anything like that, that I speak there in that letter of fearing that prices would get terribly low, and tell him not to sell cement. Now, whether it would come through some one putting in a base at our mill or whether it would come through other prices at destination or what not, the foolishness of loading up when you know that you are going to lose your shirt is something that I don't think any business man would do.

Q. Do you recall attending a meeting—

A. I beg your pardon?

Q. Do you recall attending a meeting in preparation for

the code, a meeting of several districts of the Institute and participating with regard to a resolution condemning the putting in of a maximum base price at a mill by a mill that is not located there or a company that has no mill there?

A. It seems to me, Mr. Wooden, that you have asked about three questions in one. Let me say that—you say an Institute meeting?

14312 Q. Several districts of the Institute.

A. Yes. Let me say that the company belongs to the Institute, and that—I might ask what dates you refer to, to start with.

Q. Well, to be more specific, showing you Exhibit 828-6T to -7H, and, particularly, to a page marked "14" of those minutes—

A. Is there some particular thing that you want me to look at?

Q. Yes, this paragraph numbered 5 on page 14.

Mr. Leisure: Does the exhibit show, Mr. Wooden, those who attended the meeting?

Mr. Wooden: Yes, it shows Mr. Tyler was present.

A. Of course, if the minutes show that I am present, why, I take it, that I was there, but I don't remember it.

Q. Do you recall seconding the motion that the provisions set forth there be adopted?

A. That I seconded the motion in these papers here you show me, ten or twelve pages?

Q. Yes.

A. Well, no, I don't recall seconding a motion. I am not denying being a member of the Instiute, but when you go back to 1933 and ask me about some particular meeting, I really don't remember being there at all.

Q. Directing your attention to this numbered

14313 paragraph 5, taken with the introduction to it, that it is unfair for manufacturers to establish a maximum (base) price at the mill of a competitor "constitutes an act of unfair competition."

A. I don't remember anything about the papers, whatsoever, Mr. Wooden, but I would say that I would second a motion that that would be unfair, but I don't remember anything about the documents.

Q. What are the ground on which you consider it unfair?

A. Beg your pardon?

Q. What are the grounds on which you consider it unfair?

A. I don't—it wouldn't seem to me as if any competitor in any line of business, even if it is possible for him to do so, that it would be unfair for him to try to set prices to ruin another company.

Q. You think that would be calculated to ruin another company?

A. It might not be calculated to do it, but it could run to that extent.

Q. I don't mean "intended to do it", but having that potentiality.

A. It has that potentiality, yes, sir, Mr. Wooden. Suppose we would say that somebody—

Q. Explain where it does.

A. Suppose some one had set a base price at
14314 either one of our mills at 50 cents a barrel. If it was there long enough, it would ruin us.

Q. Would it mean a loss to them also?

A. Not necessarily. It would depend. It is all a matter of condition, and where they were located, and many things, and, going back to the question a little while ago, that is just the thing they could do if we had a million barrels sold, and that is the thing that I was telling Mr. Capen not to do.

Q. If they put in a base at your mill, would they be having much business in that territory, as much as you?

A. Well, of course, Mr. Wooden, you realize that I wouldn't know that, but they could have, say, a small amount and other mills could be selling at the same time. There is practically no territory but what approximately fifteen cement plants are contending for business on an intense basis all the time.

Q. Will you state whether or not that was one of the potentialities of that situation; namely, this: that you can't get any more than that base price put in there by an outside mill, and if you go outside a limit of territory, you have to take less, and the mills that come in there don't have near as much business to lose or take at that figure? Is that correct?

A. That doesn't follow at all, Mr. Wooden, that
14315 reasoning. When you assume that there is a base point one place, you have got to take into considera-

tion what the prices are surrounding that within six or seven or eight hundred miles.

Q. Yes.

A. Yes.

Q. But if base prices dropped everywhere in that large area, then the mill or the company that put it in at your plant would suffer, too, would it?

A. Yes, sir, if the prices of cement, Mr. Wooden, at destination, was on any basis whatever, and the Dewey Company following the policy of their 32 years couldn't get any more than these prices at destination, and then anything that you might speculate on would happen.

Q. And anything what?

A. Anything that you wanted to speculate on could happen, that is, as to ruination, what price you would get, and so forth.

Q. Have you ever held any official place or position in The Cement Institute?

A. No, sir.

Q. Has your company been a member of the Portland Cement Association?

A. Yes, sir, practically continuously for 30 years.

Q. When was it not a member?

A. Well, there has been some--well I will say 14316 twice. It might be three times, that when other companies in the localities of the Dewey mills would not support the Portland Cement Association, the Dewey Company would withdraw either one or both of its mills for the reason that we wouldn't be willing to pay the costs of an organization to create the uses of concrete and let the other fellow take a free ride.

Q. When was that?

A. Well, I haven't that in mind, but I know that occurred a couple of times, and I think in '31 and '32, that there was many withdrawals from the P. C. A., that we withdrew either one of our mills at that time, but I am not certain as to the time.

Q. Will you check on that and let us know tomorrow?

A. Yes, sir.

Q. The dates that you—

A. Yes, sir, glad to do it.

Q. —that you had membership and rejoined the Portland Cement Association?

A. Yes, sir.

14317 The Witness: Do I understand the Examiner, that I should bring the information in?

Trial Examiner Norwood: If you told him you would.

The Witness: Well, I meant whether you wanted me to follow that suggestion.

By Mr. Wooden:

Q. Mr. Tyler, did the Dewey Company belong to an organization known as the Kansas City Cement Bureau?

A. Yes, sir.

Q. During what period of time?

A. Well, I don't recall just that period, either, but we belonged to it.

Q. Did you hold any official place in that organization?

A. No, sir, I didn't.

Q. You were never treasurer?

A. Never what?

Q. You were never treasurer?

14318 A. Never what?

Q. You were never treasurer?

A. Well, it may be that I ought to make a different answer. It seems to me that I was. I had forgotten that. I am not certain but it may be true.

Q. Who were some of the other members of that organzation?

A. Generally speaking, the cement plants, and I don't know that all of them belonged, but, generally speaking, the plant, oh, I suppose you would say surrounding Kansas City within some three, four hundred miles. I don't remember the plants, but the companies owning the plants, of course.

Q. Including the plants in eastern Kansas?

A. In eastern Kansas?

Q. Yes.

A. Yes, sir. As I say, I don't know that all of them belonged, but, generally speaking, that is true.

Q. What did the Kansas City Cement Bureau do?

A. Well, we have a freight rate department.

Q. What did the freight rate department do?

A. The compiled freight rates.

Q. For what purpose?

A. For the benefit of the members that cared to avail themselves of the freight rates.

Q. Can't you be more specific?

14319 A. Well, really, I thought I made a complete answer. I said for the members of the Bureau that cared to avail themselves of the information of the freight rate department.

Isn't that a complete answer, Mr. Wooden?

Q. No. I am asking you for what purpose the freight rate compilation was made by the Kansas City Bureau.

A. Well, anyone that wanted to avail themselves of the information, why, they would do it in order to ascertain what the freight rate was to any point they were interested in.

Q. Did they put out a freight rate compilation?

A. I don't recall that they did.

Q. Did they circulate among the membership regularly or systematically any freight rate information?

A. Well, will you ask me the question again?

(Question read.)

A. I don't recall that they did, but I know they had a traffic man in the office, and that he—

Q. Who was that?

A. I don't remember that traffic man's name.

Q. Did you ever hear of the Iola Cement Traffic Association?

A. Yes, sir; that is long years ago, some 25 years ago.

Q. Didn't that continue until comparatively recent time?

14320 A. Well, I am going to make the conjecture that it continued up to, oh, say, 18 years ago.

Q. About when did this freight department of the Kansas City Cement Bureau operate?

A. Well, it seems to me that they started, oh, say, 1931, 1930. It seemst to me that is about right.

Q. Was there a long period in there between the end of the Iola Bureau and the freight department of the Kansas City Bureau?

A. No, sir. There was another bureau that a man by the name of Norcross had which was some—was for some 5 or 6 years.

Q. Did that immediately precede the freight department of the Kansas City Cement Bureau?

A. He had a freight department also.

Q. Did it immediately precede?

A. Did it what—precede what, Mr. Wooden?

Q. Did it immediately precede the freight department of the Kansas City Bureau?

A. Well, it was before, but whether they connected up and there wasn't some lapse of time there, I don't know. I simply know they were in existence, but I don't know the periods that they cover.

Q. Where is Mr. Norcross?

A. Well, the last I heard of him he was running a ranch some 40 miles out of some town down in Ala-
14321 bama or North Carolina, some place down there.

Q. You are not sure?

A. No, I don't know where he is. I haven't seen him.

Q. You are not sure it was Arkansas?

A. I haven't seen him for a long time.

Q. Well, what other things did the Kansas City Cement Bureau have besides this freight rate department?

A. We reported specific contracts to them. They had a credit department. And the thing that made it valuable to the Dewey Portland Cement Company, because we didn't avail ourselves of the freight rates, was the legal advice that I would get from the man that was at the head of it.

Q. Who was that?

A. Baxter McLain.

Q. What kind of legal advice?

A. Well, do you care if I give you one illustration that comes to my mind quickly?

Q. Well, I would like to have a general characterization.

A. A man down in Oklahoma took the position that because he offered to pay us cash for a car of cement, that we had to ship it to him at a town where we had a dealer, and that dealer stood high with us. I asked McLain if that was something that we had to do, and he said, "No, sir, the Supreme Courts have held that you have got a right to pick your own customers."

14322 Q. Is that the only kind of legal advice that—

A. Well, that is—

Q. —that you got from him?

A. Well, I figure a thing like that is important.

Q. Well, I say, is that the only kind you can remember now?

A. Legal advice in connection with questions that I would ask him.

14323 Q. Did the members of the Cement Bureau report to the Bureau or any official of it their production and shipments and stocks on hand, or anything like that?

A. No, sir, I don't think so.

Q. No production or shipments?

A. No, sir, I don't think that that had any part in what Mr. McLain handled.

Q. Did the Kansas Cement Bureau have a code of ethics?

A. No, sir; I am very certain they didn't, and there might be one chance in a hundred I am mistaken, but I say no.

Q. Showing you papers marked for identification, as 140-5 to 140-13, headed "Kansas City Cement Bureau Code of Ethics," did you ever see a code of ethics of the Kansas City Cement Bureau"?

A. If this is something that they did have, I didn't remember it, and I am mistaken when I say that they didn't, and right now I don't know that they had one. I don't remember of their having one.

Q. You think you are mistaken in saying they didn't have?

A. Well, I can only make the same answer as before, that I don't remember that they did have.

Q. Just look over the document and see if there is anything about it that you remember.

A. Well, of course, Mr. Wooden, as I glance at
14324 that, I still make the answer that I don't know whether they had a code of ethics, but I could be mistaken, and, as I note the way this reads, it is sort of in line with the code of ethics in the NRA code. That is, I remember some of the items in the NRA code, but I don't remember this part of the Kansas City Bureau.

Q. Directing your attention to the date, 1929, on the last line—

A. Yes.

Q. In other words, Exhibit 140-13. Does that help you in any way as to—

A. The last line?

Q. Yes. —as to whether there was a code of ethics of the Kansas City Cement Bureau about that time?

A. There are several signatures. No, sir, I really don't remember it at all.

14327 Q. I am showing you a paper marked for identification as Commission's Exhibit 2618. Have you ever seen that paper before?

A. I don't recall ever seeing it, no.

Q. Did you ever give that paper to Mr. Charles M. Johnston, representing the Federal Trade Commission?

A. No sir, not that I know of. I must say again that I absolutely don't remember of ever being contacted by Charles M. Johnston.

14328 Q. Do you recognize it as containing any information regarding the business of the Dewey Portland Cement Company?

A. Of course, it could pertain to the business of any company because it shows a lot of shipments. On account of it saying the Dewey Portland Cement Company, why that could be, of course, shipments that were made by the Dewey Company.

Q. Do you recognize the information contained in it as information from the records of the Dewey Portland Cement Company?

A. Don't you realize, Mr. Wooden, eight years ago, showing me a lot of figures, that I couldn't say that I recognized them?

Mr. Wooden: All right. Your Honor, at this time I desire to offer Exhibits previously marked and identified as Commission's Exhibits No. 2386 and 2387, identified by Mr. Bass in Chicago as material furnished him by the witness; and I will be glad to show the witness the two papers.

(Documents were handed to the witness.)

A. While this isn't a matter that I am entirely familiar with like our sales department—

By Mr. Wooden:

Q. (Interrupting) 2386 is a circular of your company, Mr. Tyler?

14329 A. I do recall, and I presumed it was Mr. Bass, but I see this has got Johnston's name on it.

Q. That is Bass.

A. Oh. "Jon," I took that for Johnston. I do recall—

Q. That is your company's circular to the trade, is it?

A. Yes sir.

Q. All right.

Mr. Leisure: What is the number of that?

Mr. Wooden: 2386.

By Mr. Wooden:

Q. Do you remember giving Mr. Bass the information that is on 2387?

A. Well, individually I don't remember giving him this, but it could be true that he got it from someone else. I recall going back to the office one time when they stated that someone was in from the Federal Trade Commission and he had asked for some information and stated that they had given him some information.

14332 *Examination on Voir Dire by Mr. Leisure.*

Q. Mr. Tyler, I think you said that Exhibit 2386 for identification was on your letterhead and is one of your papers, is that correct?

A. What I mean to say is what I meant to say before, that just looking at it I presumed that it was one of our papers but I didn't remember handing it to him.

Mr. Leisure: As to that exhibit we have no objection.

By Mr. Leisure:

Q. As to Exhibit 2387, Mr. Tyler, did I understand you to say that some Federal Trade Commission—some representative of the Federal Trade Commission asked someone in your office to prepare that for him?

14333 A. Yes sir. I said I didn't remember it but it may be true that we did.

Q. I see.

A That is something I don't know about.

Q. You had nothing to do with it personally?

A. No, I don't think so, and I restate what I said—

Mr. Wooden: (Interrupting) The testimony shows—

Mr. Leisure: (Interrupting) Subject to check, if we can find that it was prepared in Mr. Tyler's office, we have no objection and we have no objection to it going in now with permission to move that it be stricken if that is not a fact.

Mr. Zimmerman: I have nothing to add.

(COM. EXS. 2386 and 2387 were offered and received in evidence.)

Direct Examination (Continued) by Mr. Wooden.

Q. Mr. Tyler, I will ask you whether or not Exhibit 2387 is not a list of basing points and basing point prices which your company supplied to Mr. Bass?

A. I still continue to say, Mr. Wooden, that
14334 I don't know what it is.

Mr. Wooden: I think the Reporter ought to put the number on the paper itself rather than on the thing to which it is attached.

Trial Examiner Norwood: Yes.

By Mr. Wooden:

Q. Showing you Exhibit 2170, being a copy of a letter addressed to you by your Mr. Capen, do you know what Mr. Capen meant by the expression "base price" that he referred to,—used several times there?

14335 A. Let me make the observation first, Mr. Wooden, that this letter isn't signed.

By Mr. Wooden:

Q. Yes, but it is—

A. (Interrupting) But even presuming that it did come from Mr. Capen, as you said it did, although it shows no signature, what I would understand when he mentions the base price would be the same old story because we have been sticking to it for 32 years, that if somebody used any sort of a compilation that brought about any sort of a price at the market place, at destination, that is the one that the Dewey Portland Cement Company is searching for all the time.

Q. Referring to Exhibit 2172—

A. (Interrupting) Yes sir.

Q. (Continuing) —do you remember anything about that transaction?

Trial Examiner Norwood: That is Commission's Exhibit 2172.

A. Yes sir, I do. I won't say that I remember it particularly in the way you put it, but that is a letter that I dictated.

By Mr. Wooden:

14336 Q. Do you remember anything about the transaction?

A. No sir, I don't other than that I want to testify to facts on a basis, and I will say that I wouldn't have said that excepting it was true.

Q. Is that your handwriting at the end of the last paragraph?

A. Yes sir, it is.

Q. Do you know what the circumstances were at the time under which you wrote that letter?

A. No, I don't, and the letter itself says that I don't know, right on the face of it. It says that I don't know.

Q. Where does it say you don't know?

A. Well, I don't mean to say in exactly those words. It says that "no other word from them", and that signifies to some extent that I don't know where I am at.

Q. You knew where you were at in the second paragraph, didn't you?

A. Wait a moment. You have to give me time to read it, you know.

Q. Yes.

A. Of course, that is where I—in the second paragraph, that is where I draw the observation, my own individual opinion that the prices that were in that envelope, that they hoped, and that is what I say, wouldn't make lower prices.

14337 Q. What did those prices relate to?

A. I don't know.

Q. Anything unusual about it?

A. Yes sir, it is very unusual for the reason that I never remembered ever getting any prices before and I never remember getting any since. It is unusual in that respect, and that is ten years ago, so that I wouldn't remember, perhaps everything about it.

Q. What did you mean by telling Mr. Capen to make the proper price and be sure he was right? What was the proper price to make?

A. Identically the same thing we have been doing for 32 years. A warning to make the prices as he thought it was at the market price at destination.

14338 Q. Referring you to Exhibit 2177, being a letter, —a copy of a letter written by you to Mr. Capen on March 11, 1931. It makes references to exchanging shipments with other companies.

A. Yes sir. I recall quite well that letter.

Q. Has your company at times exchanged shipments with other companies?

A. I am very sure that we have never exchanged any amount of cement with any other company at any time.

Q. You had had another company ship for your account?

A. Not that I recall.

14339 Q. Did you ever ship for any other company's account?

A. Not that I recall.

Q. You said here in 2177 that you would, of course, have no objection to exchanging shipments with any company provided "we could secure a worthwhile greater earning".

A. Yes sir. I know exactly what I had in mind and I feel that if it were true that some company had cement sold where, by our making an exchange, that we could make a greater earning and they could make one, and I will say now that I feel that we would be within legal limits and be doing nothing wrong by making such a trade with them.

Q. Although you say—

A. (Interrupting) Although we never have done so.

Q. Although you never have done so?

A. Although we never have done so. But, when you say I signified my willingness, that is the answer now.

Q. Have you ever asked another company to exchange shipments with you?

A. Well, I don't recall asking any company to. Maybe I did and they refused, but I don't remember of asking any company.

Q. I show you Exhibit 2180, I will ask you whether or not you didn't ask Mr. Rader of the Lehigh Company to exchange one hundred thousand barrels with you?

14340 A. Yes sir, that is correct. It shows that I did talk to Mr. Rader about a matter of letting us ship a certain 100,000 and he ship a certain 100,000 on which we could both make a little bit bigger earning.

Mr. Leisure: What is the exhibit number?

Mr. Wooden: 2180.

Mr. Leisure: What is the date?

Mr. Wooden: April 11, 1931.

A. But the same letter, Mr. Wooden, says that Mr. Rader didn't see his way clear to do it.

By Mr. Wooden:

Q. And the same letter says you would ask him again in a few days.

A. Yes. Well—

Q. (Interrupting) Did you?

A. I don't remember that, but I know the trade wasn't made.

Q. When you said you would be glad to make exchanges of that sort if it made you a greater earning, or what—what was that?

A. What I said was, Mr. Wooden, that I would feel that I was acting within legal limits if one company would, say, trade another company cement and by doing so that they would each get a little bit bigger earning.

Q. A little larger mill net?

14341 A. Yes sir, a little larger mill net, taking into consideration all the qualifications that I keep making.

Q. Have you ever discussed that with other companies?

A. I beg your pardon?

Q. Have you ever discussed that with other companies?

A. I don't remember discussing it with other companies.

Q. You don't remember whether you stood alone or not on the legality of that?

A. No, I don't.

Q. Did you say in—I notice you said in Exhibit 2180 that Mr. Rader told you that many companies were wanting to trade.

A. Well, I can understand that that would be true from this standpoint—I don't now that it is true and I don't recall Mr. Rader saying that, although I see it here so evidently he did—but my analysis of that, particularly when cement was selling at a loss, that one would be inclined to try to make a trade with somebody wherein it wouldn't burden the ultimate consumer.

Q. Make a trade that would relieve both companies, you mean?

A. Well, yes. If you, Mr. Wooden, had 50,000 barrels of cement sold some place and I had 50,000 barrels of cement sold some place we would take into consideration the

14342 location of our mill, that you could come to me and I could come to you and say "If it is agreeable to the buyer, let's swap these shipments and you can make 10 cents more and I can make 10 cents more."

Q. And it wouldn't cost the buyer any more delivered?

A. It wouldn't cost the buyer any more delivered.

Mr. Leisure: Just a minute. Can't we confine these discussions as to what happened?

Trial Examiner Norwood: I think this official explanation of the method is competent evidence.

The Witness: But we have never made a trade of that sort.

By Mr. Wooden:

Q. Referring you to Exhibit 2185, your letter to Mr. Capen, August 15, 1931—

A. (Interrupting) Yes sir.

Q. (Continuing) —you said the Marquette Company had made a chronic practice of making deals of 10 cents off to line yard companies. What was the basis for your statement of that sort?

A. Well; I made a poor choice of words when I used the word "chronic", but what was true at that time with the market being so terribly demoralized that any company would be justified in saying that they was cutting prices in all directions.

Q. In other words, what do you mean by cut 14343 prices? Cut below what?

A. Cut below what you might call current prices.

Q. Current delivered prices?

A. Yes, current delivered prices when you get a demoralized market.

Q. Was the Marquette Company noted in the trade, as you understood it, for making price cuts?

A. During that period of two or three years everybody was saying it.

Q. What did you mean by saying Marquette was chronic?

A. As I said, that was a poor choice of words. I don't know that that should be used for them more than the others, but during the period of two or three years any company could have accused the other company of doing most anything in connection with prices and it might be correct.

Q. Referring to the last paragraph of Exhibit 2185, you spoke of making no change for the present, "awaiting the results of the meeting in Chicago the 20th of this month". What meeting did you refer to?

A. Mr. Wooden, I referred to a meeting in Chicago on the 20th of August, 1931, where I realized that I would contact others in the cement business, and on account of the great demoralization and so forth that I expected to

talk to them individually on a basis of just sort of wondering what it was all about, these prices.

14344 Q. And did you attend such a meeting?

A. Yes, sir. That meeting was one that I knew was coming, where I had been notified by the Portland Cement Association that there was going to be a luncheon given or a dinner, I have forgotten which, for the incoming President of the Portland Cement Association, which was Mr. E. J. Mehrin, who was the first paid President that the P. C. A. ever had, and knowing that I was going to go there, and him writing me about all these cut prices and so forth.

Q. Who writing you?

A. Mr. Capen. That I would tell him, and I will say again that he was new in the business,—I gave him the advice of a father-in-law, you might say, of saying don't take action and to try—

Q. (Interrupting) As I understand you, you attended this meeting in Chicago?

A. Yes sir.

Q. What other manufacturers were there?

A. I don't recall.

Mr. Leisure: I object to that. We are going far afield again.

A. I don't recall what other manufacturers were there.

Q. What discussion did you have?

Trial Examiner Norwood: Wait a minute. Read the question.

14345 (The question was read by the Reporter.)

Trial Examiner Norwood: What sort of a meeting was this?

Mr. Wooden: It was a meeting on the 20th of August, 1931, which he said he attended.

The Witness: Yes.

Mr. Wooden: A luncheon meeting held under the auspices of the Portland Cement Association.

Mr. Leisure: The Portland Cement Association, not having been named in the complaint, it is just as if he asked him about any other luncheon he might attend.

Trial Examiner Norwood: Objection overruled.

The Witness: What is the question?

Mr. Wooden: What is the question?

(The question was read by the Reporter.)

The Witness: I don't recall what discussion. It wasn't

in that manner at all of any meeting called for any purpose.

By Mr. Wooden:

Q. You just took advantage of a meeting that was called for another purpose, is that it?

A. I only happened to tell Mr. Capen, when he was asking me about this great demoralization in prices and cutting, what to do, that I spoke of a meeting that I
14346 knew I was going to and had in mind talking to different ones individually, which I am sure I did, although I don't remember just what ones.

Q. Do you remember any of the ones you talked to?

A. No sir, I don't.

Q. Do you remember any other manufacturers from this territory that attended?

A. Well, no, I don't remember.

Q. Were there such?

A. I beg your pardon?

Q. Were there other manufacturers there from this territory?

A. It could be true, but I don't remember.

Q. You don't remember a single one?

A. No sir, I don't.

Q. Were there manufacturers there from the east?

A. Oh, I presume so. I don't know.

Q. Did you get a report of the meeting?

A. Oh, I don't think there would be a report made of a meeting of that sort. It was only just rather informal or perhaps a formal dinner where the incoming President was coming in, and there was a little gathering there to meet the man for the first time, which is what I did.

Q. You had informal discussions of that sort on other occasions?

A. No sir.

14347 Q. Never but the once?

A. No sir. Oh, well, if you mean that I discussed matters with my competitors, yes, certainly.

Q. Well, that is what I intended to ask.

A. I have talked to my competitors about various proposition of all kinds as long as I have been in business. I have never thought it was wrong, Mr. Wooden, to cooperate with your competitiors within legal limits.

Q. No one would question it the way you state. Just a question of what are legal limits.

A. Well—

Q. Have you had informal gatherings of that sort in this locality?

A. In this locality?

Q. Yes.

A. Oh, I can remember several times,—not as a result of any meeting called for any purpose, just on account of the friendly relationship among people, talking about conditions in the business, all sorts of matters, freight matters, labor matters,—particularly labor matters the last four or five years.

Q. Have you talked about competitive conditions?

A. Competitive conditions? Might have mentioned that we couldn't make any money now.

Q. Have you talked about competition between
14348 different concerns?

A. Well, yes, in a general way, matters of that sort would be mentioned.

Q. Have you talked about price competition?

A. I don't think so, except in a way that this would come up here. That is what we are talking about here.

Q. That was price competition you were talking about there?

A. That is what Mr. Capen writes about, is the exceedingly low prices being made.

Q. But you were writing about the meeting?

A. Yes.

Q. Let me call your attention further to 2185.

A. He writes about the exceedingly low prices being made.

14349 Q. Yes, I know.

A. And I tell him not to.

Q. Didn't you tell him to await the outcome of the results of the meeting at Chicago before deciding what to do about prices?

A. I told him that I was going to that meeting, and indicated that I am making a further answer when I am able to find—get what information I can.

Q. Of course, what you wrote is here?

A. Yes, sir, it is there.

Q. What did you mean by saying that "practically all base prices might go down if nothing was accomplished at the Chicago meeting"?

A. Well, when—

Q. What did you mean by "base prices," there?

A. When I speak of it in that way, why, I mean that there is no telling what prices cement companies will make.

Q. What base prices?

A. Well, base prices.

Q. Yes, what you mean by base prices there.

A. The one that would affect the prices at destination.

Q. I see. I thought you said that destination prices were not made up of any base prices?

A. I still say that.

14350 Q. All right.

A. Of course, when you go back to my explanation of a couple of hours ago, it doesn't mean anything when you use base price or what I mean or anybody else that uses that phrase. It doesn't mean anything.

Q. Didn't you send Mr. Capen a report of that meeting of August 20, 1931?

A. No, sir; there was no report to send him. I may have written him some letter in connection with giving my ideas about the market.

Q. Now, I call your attention to Commission's Exhibit 2186. Didn't Mr. Capen—

A. May I make a little further answer?

Trial Examiner Norwood: Yes.

By Mr. Wooden:

Q. Yes. I don't want to check you off.

A. A little further answer I would like to make is that within approximately two years after this time the prices took the greatest nose dive that they have ever taken in this country. So evidently—

Q. Two years? You mean in '33?

A. Well, yes, it ran—Mr. Wooden, when you have exceedingly low prices in any year, there is always an immense amount of cement that is shipped on those low prices the succeeding year.

14351 Q. Yes, you don't mean—

A. And for two years after that, just approximately speaking, cement was selling at an immense loss to practically every company in the vicinity where I am located.

Q. You don't mean to say, then, that prices took a big nose dive in 1933, do you?

A. Not in '33, no. I said the next two years after 1931.

Q. You said two years afterward it took a nose dive?
A. No, no, right there in '31 and '32.
Q. That is when they took the nose dive?
A. But after this meeting.
Q. Yes.
A. Yes, sir.
Q. Do you recall prices going up as much as 40 cents a barrel in July, 1932?
A. No, I don't remember it going up any amount that time.
Q. Referring to Exhibit 2186, Mr. Capen writing to you, August 22, 1931, two days after the meeting—
A. Yes.
Q. —it says "also note the report of the meeting." Of course, the news is disappointing."
You did make him a report, then, did you?
A. Well, that would mean that I wrote him a letter and I presume he called that a report. I say I didn't recall. I did evidently write him a letter.
14352 Q. Can you produce that letter?
A. I will look for it.
Q. I wish you would.
I notice in 2186 that Mr. Capen tells you that the news was disappointing that more was not accomplished.
Was something accomplished?
A. Why, I can conceive that I might have told him that I talked with different ones and was hopeful there might be some sort of reasonable prices made. I don't remember whether I would tell him, but that would be the natural thing that I would do, but evidently I was very much mistaken by what happened a couple of years after that meeting. There surely wasn't anything accomplished.
Q. Referring to 2187, a letter from Mr. Capen to you, in which he wrote certain questions on the bottom: "Do you think Lehigh will bid a lower base than 1.00 at Mason City? Do you think Marquette will bid low"?
Did you answer those questions?
A. I don't remember of answering them.
Q. What did you understand by Mr. Capen asking you whether Lehigh would bid a lower base than a dollar, Mason City?
A. That would be where he was asking me for my best guess on something. I don't remember what I guessed.

Q. Did you ever see the Exhibit 2188, which I
14353 show you, a map?

A. No, sir, I never saw that map. I didn't know it was in existence.

Q. You never saw anything like it?

A. Well, I wouldn't say like it. I don't recall this map. I am well enough posted so that I grasp what the circles mean, but I never remember seeing the map. I didn't know it was in existence.

14354 Q. Showing you a paper, Mr. Tyler, marked, for identification, as Commission's Exhibit 2619, is that your signature?

A. Yes, sir.

Q. That is your signature to 2619?

A. Yes, sir.

Q. What—will you say what 2620 is?

A. Well, that is basing points as existed at that time.

Q. 2620?

A. Yes, presuming it is correct attached.

Mr. Wooden: I offer 2619 and 2620.

Mr. Leisure: May we have what the witness said about 2620? We didn't get it.

Trial Examiner Norwood: Read it.

(Record read.)

Mr. Leisure: Well, now, this 2619 seems to be a letter to the Federal Trade Commission signed by Mr. Tyler.

Examination on Voir Dire by Mr. Leisure.

Q. Do you know whether or not this is the exhibit that was attached (indicating)?

14355 A. No, I don't know that it is, that that is the answer that I made. I don't know that it is, that is, exactly the answer I made. That I didn't know.

Mr. Leisure: Subject to check, Your Honor, we have no objection. If we find that there is another, we will ask permission to strike that.

(COM. EXS. 2619 and 2620 were offered and received in evidence.)

Direct Examination by Mr. Wooden (Resumed).

Q. Mr. Tyler, why is it that you used the expression "basing points" with regard to Exhibit 2620 and used

that expression in your letter that is marked 2619, and are unwilling to use that expression today?

A. Well,—

Mr. Leisure: Your Honor, we have been over that argument so much. Must we continue it?

Mr. Wooden: All right.

Trial Examiner Norwood: I don't think the question is just the same.

Mr. Leisure: We can never agree on that subject, apparently, and we just prolong the argument.

14356 A. I used—if I used it in that letter, it would be erroneously used as compared to the practice of this company for 32 years.

By Mr. Wooden:

14357 Q. All right.

Q. I am showing you, Mr. Tyler, a paper marked, for identification, as Commission's Exhibit 2621. Is that your signature to that document?

A. Yes, sir.

Mr. Wooden: I offer it in evidence.

Trial Examiner Norwood: Any objection?

Mr. Leisure: No objection.

(COM. EX. 2621 was offered and received in evidence.)

Q. What were the circumstances under which as indicated by this letter the Penn-Dixie shipped for your account in Tennessee some 14,000 barrels?

A. Mr. Wooden, I don't recall the circumstances covered in that letter at all.

Q. You said a while ago that no company ever 14358 shipped cement for your account.

A. Yes. I thought I was telling the truth when I said that, and I still think so, although this here would look as if I was incorrect in my statement.

Q. Yes, I think it would.

A. Yes, that would indicate that I was incorrect in my statement.

Q. And you can't say now the circumstances that caused the Penn-Dixie Company to ship 14,978 barrels for your account in Tennessee?

A. I don't remember the circumstances at all. It would be correct—it might be correct that they did ship it.

Q. Showing you a paper marked 2622, for identification, did you receive the original of that from Mr. Mallory in reply to Exhibit 2621?

A. Well, this is evidently a reply to that letter because it so states.

Q. Does that enable you to recall the circumstances under which Penn-Dixie shipped that number of barrels for your account in Tennessee?

A. No, it don't. I don't recall the circumstances at all.

Q. Is Tennessee in your selling territory?

A. Tennessee?

Q. Yes.

A. Why, no, it isn't in our selling territory at
14359 all. I can't understand.

Q. You never sold any in Tennessee that you remember?

A. Really, I don't recall ever selling any cement in Tennessee. Does that say Tennessee?

Q. Your letter says Tennessee, 2621.

A. I don't recall the circumstances at all, Mr. Wooden.

Q. Have you ever shipped any cement into District No. 6?

A. I don't recall just now what District No. 6 is.

Q. Doesn't it include Tennessee?

A. Well, it may. It may, but, as I say, I don't recall what District No. 6 covers.

Q. Well, now, you say in your letter, Exhibit 2621, "I, of course, realize on our report"—

A. Yes.

Q. —"we show the Penn-Dixie Company shipped for our account in Tennessee 14,978 barrels."

A. Yes. Yes.

Q. You have no recollection of any such—

A. No, sir. No, sir.

Q. —transaction?

A. I don't remember the transaction at all.

Mr. Wooden: I haven't offered 2622 yet. I will offer it now. It is a reply to 2621.

14360 Mr. Leisure: No objection.

Trial Examiner Norwood: Received as marked.

(COM. EX. 2622 was offered and received in evidence.)

Q. Now, in this Exhibit 2622, Mr. Mallory, in replying to your letter, which is 2621, it says "In all cases where one company ships for another, the number of barrels involved is added to the total of the company for whose

account the shipment is made and deducted from that of the shipping company so that the item is not duplicated."

A. Yes.

14361 Q. Haven't you known of other cases where one company ships for the account of others?

A. No, I haven't, Mr. Wooden.

Q. You never knew of any cases where other companies shipped for the account of others?

A. Naturally, I wouldn't know that. I don't know how I would know it.

Q. Is Exhibit 2623, for identification—is that your signature to that letter?

A. Yes, sir, that is my signature. Of course, I haven't had the opportunity of looking at the letter.

Mr. Wooden: All right. I offer 2623 in evidence.

Trial Examiner Norwood: Any objections?

Mr. Leisure: No, except that it is during the Code period, and we have always maintained that is not in the case.

(COM. EX. 2623 was offered and received in evidence.)

By Mr. Wooden:

Q. Is 2623 your answer to Mr. Mallory's letter, which is 2622?

A. Yes, sir, I should think that is my answer.

14362 Q. Why is it that you say in your letter here, 2623: "Right in District No. 8 during the last few months I absolutely know of approximately 100,000 barrels of cement that had been shipped for the account of certain companies"?

Didn't you tell me just a moment ago that you never knew of any such cases?

A. Yes, sir, I think I told you that. I told you the truth.

Q. Yes. Well, did you write the truth here?

A. Well, certainly, I wrote the truth here, and I told you the truth. I am not infallible; I forget things.

Q. What was the report of Mr. McLain that you referred to there?

A. I don't have any idea of what that is.

Q. You told me also that Mr. McLain, or that the Kansas City Cement Bureau didn't have any figures on production and shipments, too; didn't you?

A. I still think that he didn't have any.

14363 Q. It was during the Code period?
A. During the Code period?
Q. Yes, September, 1934?
A. Yes. Well, of course—
Q. What did you mean by this statement in your letter, Exhibit 2623: "This process of allocating shipments I have taken a considerable part in myself here"?
A. Well, I really don't know what I was referring to.
Q. You don't know?
A. No, sir, I don't. I know that during the Code period, that the Code authorities were very strict with everything, and in our own department over there, we certainly tried to keep within the bounds of the Code in every respect.
Q. Well, did you understand that under the Code shipments might be allocated?
A. No, sir; I don't know that I understood that. I don't know as I understood it either way, but I know that—
Q. Do you mean to say now, Mr. Tyler, that although you wrote that you had taken a considerable part
14364 in the process of allocating shipments, that you now don't remember anything about it?
A. No, sir, I don't.
Q. You say also in Exhibit 2623, that "not one adjustment has been made using the same principal that Mr. Mallory had used covering his subject matter."
What adjustments were made in the process of allocating business?
A. Let me see that letter. Where are you reading from, Mr. Wooden?
Q. Allocating shipments.
A. Is that the question you asked me?
Q. Yes.
14365 A. I don't know.
Q. Did you ever handle any records that showed the allocation of shipments between different companies?
A. Not that I know of, not that I recall.
Q. Did you ever handle any funds in that connection?
A. I don't think so. I am sure I didn't.
Q. Were you Treasurer of this local group?
A. Well, the Kansas City Bureau that you asked me about an hour ago.
Q. Yes.

Mr. Leisure: Mr. Wooden, we can't hear him. If you don't mind getting back a little, we may hear him.

A. I made the reply to that, that I thought I was Treasurer.

By Mr. Wooden:

Q. Yes.

A. Yes, sir; I made that reply, and I think it is correct.

Q. Well, in the handling of the Treasurer's funds, didn't you have something to do with allocating shipments?

A. No, sir, in no way, shape or manner.

Q. What effect on the Dewey Company's business did it have when the Pennsylvania Dixie Company shipped 14,978 barrels for the Dewey Company's account? How was it handled?

14366 A. If I would have been able to have given you the answer, Mr. Wooden, of recalling what the transaction covered, I would be able to answer the question now, but on account of not recalling the matter at all, I can't answer this question.

Q. Who in your company could tell how such matters were handled on your books?

A. Who could tell?

Q. Yes.

A. I could tell by investigation.

Q. Who can tell without investigation?

A. Well, I don't think there is anyone that could answer your questions today better than I have. Other than saying that, I don't know.

Q. Mr. Tyler, did you ever tell any representative of the Federal Trade Commission that the Lehigh Company set a base on the Dewey plant?

Mr. Leisure: I think we ought to know—

A. No, sir.

Mr. Leisure: —who the witness is being interrogated about.

A. No, absolutely not, Mr. Wooden, and the fact that there was no such a base indicates that I did not tell him that.

Q. You set one yourself, I believe?

A. Oh, we went through that, you know, a couple of hours ago.

14367 Q. Yes.

A. But you asked now about the Lehigh Company?

Q. Yes, that is right.

A. Yes.

14368 Q. Does your company, Mr. Tyler—has it continued to use any of the forms that were once used by the Iola Cement Traffic Association?

A. Oh, I would feel very certain that we haven't, because when you refer to forms which refer to matters of 15 to 18 years ago, naturally we change all forms in a period of that time.

Q. You are just inferring that, are you?

A. Well, I don't know absolutely.

Q. All right.

A. But I am quite certain that we wouldn't be using any forms that old. And I don't know that we ever used any forms that somebody else had.

14370 Kansas City, Missouri,
January 20, 1939.

14371 E. E. WOODS, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. MacIntyre.

I am Secretary of the Southwestern Lumbermen's Association which is a trade association serving the retail lumber dealers of Missouri, Kansas, Oklahoma and Ar-
14372 kansas. Its jurisdiction is a territory limited completely to those four states only. It is affiliated with other trade associations in that we are part of the National Retail Lumber Dealers Association along with the other constituent divisions.

Q. Who are the officers as you can recall them of the National Association?

A. Don Campbell, Lebanon, Kentucky, is the president of the National; Frank Carnahan, Washington, D. C., is secretary; the presidents and secretaries of the constituent associations are the board of directors; and we have an executive committee.

Q. Do you know anything about the existence of the Mountain States Retail Lumber Dealers Association?

A. Yes.

Q. Is it or is it not a part of the National Association just as your organization is?

A. It occupies the same relationship to the National serving the States of Colorado, Wyoming, New Mexico.

Q. Who holds the comparable position in it that you do in the Southwestern?

A. Allen T. Flint is Secretary of the Mountain States Association. For the moment I don't recall the president.

Q. What other units in the western states here
14373 can you recall are also affiliated with the National such as the Southwestern, the organization that you are employed by?

A. The Northwestern Association with offices in Minneapolis, the Nebraska Association with offices in Lincoln, the Texas Association with offices in Houston, the Western Retail Lumber Dealers Association with offices in Seattle, and the California Association.

14374 Who, if you can state, is the Secretary of the Nebraska Association?

A. Mr. Phil Runion.

Q. And can you name the Secretary of the Northwestern?

A. Ormie C. Lance.

Q. Is there an organization in Illinois similarly affiliated with the National Association as is the case of your Southwestern Association?

A. The Illinois Association is affiliated.

Q. What is its name?

A. Illinois Lumber & Building Material Dealers Association, I think is the correct wording.

Q. Can you name the Secretary of that Association?

A. Mr. J. D. McCarthy.

Q. Can you recall of a man by the name of Adolph Phund having been connected with that Association?

A. Adolph Phund was Secretary of the Illinois Association for a brief period. I think only a few months. Prior to that he had been Secretary of the National Association.

Q. What period of time, if you can recall, was that that he was Secretary of the Illinois Association?

A. Well, our Southwestern was not a member of the National up to the time of the Code, and about the time the Code came in the National became active again and the Code came in in 1933, so I presume that he was Sec-
14375 retary along about 1933 or 1934, but I think for only about three or four months,—a very brief interval.

Q. He was Secretary of the National previous to that date?

A. Yes, for several years.

Q. How long has your Southwestern Association been a member of or affiliated with the National Association, Mr. Woods

A. It was after 1933. The Code was adopted in 1933 and I am quite sure it was immediately before the adoption or immediately after that we took membership in the National, when it had been reconstituted whereby it becomes really an affiliation of associations.

Q. It has continued since 1933, then as an affiliate of the National, has it?

A. We have been members from that date to the present, and are members at this time.

I meant to say a confederation of associations, not an affiliation of associations.

Q. Mr. Woods, I show you document marked as Commission's Exhibit 546-00 and ask you to state whether or not that is your signature on that document?

A. I am quite sure it is my signature.

Q. That is your signature. Do you recognize the letter you wrote to the Medusa Portland Cement Company?

A. It has every appearance of being my letter.

14376 Q. And you recognize your signature to it?

A. That is my signature.

Q. I show you documents marked as Commission's Exhibits 546-KK and 546-LL and ask you to state whether or not that is your signature on 546-KK?

A. That is my signature.

Q. Do you recognize that and 546-LL as a letter and your reply to it?

A. I do.

Q. I note the words "Waggoner Stores Company" appearing in pencil on 546-KK. Do you recognize the handwriting in which those words appear?

A. I do not. I can state positively it is not mine.

Q. Not yours. Do the words "Waggoner Stores Company" as appearing thereon recall anything to your mind concerning that correspondence?

A. I know we have had a good deal of trouble with the unethical performance of the Waggoner Store Company, and if I were privileged to read the letter that you have

there it would probably recall to me what it had reference to.

May I read it?

Q. You can refresh your memory from it if you care to, if it is necessary to answer the question that I asked you.

14377 (Pause).

Q. Now, after having more closely examined the letter, will you please state if you can, whether the term "Waggoner Stores Company" as appearing on 546-KK recalls anything to your mind as to the meaning of it or as to what the correspondence was about?

14378 A. Yes.

By Mr. MacIntyre:

Q. Will you state what led up to that correspondence, Mr. Woods?

A. A condition of commercial piracy existed.

By Mr. MacIntyre:

Q. Will you explain those terms?

A. A fellow on the highway near St. Charles, pri-
14379 marily a junk dealer, who in no sense qualified as a retail lumber dealer, was getting cement from some source and demoralized conditions over a wide area. I had reason to believe that Medusa cement was being handled by this particular dealer—I will change that. Not a dealer, but this particular individual—and I wrote to the Medusa Cement Company setting forth the facts obtaining and asking that they look into the matters of the proposition.

14380 Q. This correspondence was a result of that?

A. That is right.

Q. Can you state whether or not it was handled in accordance with the correspondence? The correspondence shows how it was handled, does it not?

A. The conclusion would be obvious from the correspondence, that they ceased to be a party to the illicit transaction.

Q. You used the word "demoralization" there, Mr. Woods. Will you please explain that for us.

A. Any purported dealer who undertakes to sell merchandise at an impossible margin of profit in the locality where he does not have an investment at a lower price than he sells to his own customers is guilty of commercial heresy.

Q. Price cutting of that nature, then, is what you refer to as demoralization?

A. Only in part.

14381 The witness identified Com. Ex. 458 A, B and C as a letter appearing to have been signed by J. A. Scroggs, President of the Southwestern, the witness' association. The witness is acquainted with Mr. Scroggs. He would conclude that it is Mr. Scroggs' signature. He couldn't be positive. The witness has seen his signature regularly during the time that he was president of the witness' association. It is written in a very bad

14382 hand, but it looks like his signature. It is his signature (the witness') on that letter, Com. Ex. 2624-A and B. He recognizes it as a letter to Mr. Allen T. Flint. The witness knows that it is his signature, but he would have to read it before he could be positive that he wrote it, but he recognizes his signature to the letter; that is his signature on that letter, Com. Ex. 867-6Y. Com.

14383 Ex. 867-7C, that is his signature on that letter. This is a letter to the state procurement officer at Jefferson City, Missouri, in which the witness states that he is supplying him with some—

Examination by Examiner Norwood.

November 15, 1935, is the date. The letterhead shows Southwestern Association.

Examination by Mr. MacIntyre.

14384 It is addressed to Mr. S. H. Smith, Jefferson City, Missouri; the witness' signature appears on that letter, Com. Ex. 737-AA; the witness' signature appears on that letter, Com. Ex. 737-BB. The witness was asked to try to refresh his memory and recollection from the documents 737-BB and tell "us" whether 737-CC is the enclosure referred to in that letter. He said that "this" is a letter dated March 16, 1935, to the Oklahoma Portland Cement Company protesting a policy of distribution that had been announced by one or two cement companies at that time that "we" thought was unfair to retail lumber dealers. He couldn't be positive (whether) 737-CC is the enclosure that is referred to in 737-BB, but he thinks it is a reason-

able assumption that it is. He hasn't read it, today.
14385 The witness read the one that he mailed him.
14386 (After) glancing at 737-CC he thinks that recalls to his mind definitely what the enclosure is that is referred to in Com. Ex. 737-BB.

Q. Were you asked, Mr. Woods, to produce a letter from the Medusa Portland Cement Company to you under date of August 22, 1935—that is, asked by the Federal Trade Commission to produce a letter from the Medusa Portland Cement Company to you under date of August 22, 1935?

A. I was asked this morning to produce a letter that was written in 1935 to our office.

Q. Did you produce it?

A. We do not keep our correspondence that far back. We didn't have it in our files.

Q. You didn't have it?

A. No.

Mr. MacIntyre: We would now like to ask counsel for the Respondents that are here representing the Medusa Portland Cement Company that they—to see if they can produce the letter from the Medusa Portland Cement Company's files.

Mr. Leisure: What is the date of the letter, Mr. MacIntyre?

Mr. MacIntyre: August 22, 1935. Addressed to this witness.

And, to aid the Medusa Company in locating it we may suggest that the letter was from the Chicago office, Mr. DeCamp's office of the Medusa Company.

14387 That is all, Mr. Woods.

Trial Examiner Norwood: Cross-examine.

Mr. Zimmerman: Nothing.

Mr. Leisure: No questions. Thank you, Mr. Woods.

(Witness excused.)

14388 L. T. SUNDERLAND, recalled as a witness, having been previously duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

Q. Mr. Sunderland, I am showing you Exhibit 2247. Is that your signature to that paper?

A. I think so. Yes sir.

May I read it?

Q. Oh, yes.

(Pause.)

Q. Showing you Exhibit 2246, do you recall receiving that from Mr. Boettcher?

A. Well, I don't recall the letter. No; I wouldn't say that I never received such a letter, but I don't recall it.

Q. Do you recall going to New York about that time?

A. No, I do not, Mr. Wooden.

Q. Do you recall attending a meeting at which
14389 you discussed this question of having a base price put in on somebody else's mill?

A. No, I do not.

Q. Referring to your letter, which is Exhibit 2247, you talked there about going down to New York, didn't you?

A. Yes; I said I regretted his state of health was such as to make him feel that he couldn't go to New York, or something to that effect.

Q. You told us when you were on the stand some days ago that you went down east and saw Colonel Young; is that correct?

A. No, I didn't say so.

Q. Oh; I am mistaken. Did you see him?

A. No sir.

Q. I see.

A. I talked to him over the phone.

Q. I see.

A. I thought I so testified.

Q. You probably did. That is just my recollection about it.

A. Surely.

Q. Did you attend any meetings at which that question of the base prices put in by outside mills was discussed?

A. I don't remember attending any such meeting.

Mr. Leisure: That was all covered by the witness
14390 on his direct examination.

Mr. Wooden: Not that phase of it, no.

Mr. Leisure: I remember these same questions and answers.

Mr. Wooden: I didn't cover the question of meetings on the subject.

By Mr. Wooden:

Q. Showing you Exhibit 2257 for identification; is that your signature?

A. That is my signature, yes sir.

(A document referred to was marked "Commission's Exhibits 2625 and 2626" for identification.)

By Mr. Wooden:

Q. Is that your writing up above the addressee?

A. Yes sir, that is my writing.

Q. Reading "personal"?

A. Yes sir.

Q. Who was the Hiram that you referred to in the first paragraph?

A. I presume it was Hiram Norcross.

Q. Who was he?

A. Mr. Norcross was at one time an officer of the Missouri Portland Cement Company. Whether he was at that time I can't remember.

14391 Q. Wasn't he at that time in charge of some statistical bureau here?

A. I don't think so.

Q. Wasn't he at some time in charge—

A. I testified that long years ago he was.

Q. Was he ever in charge of the Kansas City Cement Bureau?

A. No, sir, I think not.

Q. Or ever in charge of the division, the Kansas City Division of The Cement Institute?

A. No, I think not.

Q. What were the phases of the situation which Hiram was delegated to fry and get straightened out, so far as your district was concerned?

A. I am sorry, Mr. Wooden, I can't answer that because I don't remember. There were so many problems that we had—

Q. Wasn't it with regard to that matter of having each

mill allowed to determine its own maximum, net maximum selling base price at its own mill?

A. Well, it looks to me as though it may have had a reference to the payment of dues.

Q. Well, look at the last—

A. I understand.

Q. —the last two lines.

A. I understand. I understand. It does mention that. It also mentions payment of due. What those dues
14392 had reference to, I don't recall.

Q. Weren't they dues in the Portland Cement Association?

A. I don't recall.

Q. Whom did you refer to when you said "None of us should pay dues unless and until that principle was recognized" about the right to determine the net maximum selling price at its own mill?

A. Well, whoever of us may have been supporting whatever activities that refers to, but I cannot recall what it refers to.

Q. Were you there speaking for other manufacturers as well?

A. I was only speaking for the Ash Grove Company.

Q. What did you mean by saying "None of us should pay dues"?

A. My last answer endeavored to explain that.

14394 Q. Mr. Sunderland, showing you Exhibit 2249, dated June 5, 1931, and making reference to a meeting in Kansas City, do you remember attending a meeting in Kansas City about that time about the subjects that are referred to in that document?

14395 A. Well, I didn't write that letter.

Q. Yes, I know. I am asking you if you remember a meeting at that time about such subject?

A. No, I do not. That is eight years ago now.

Q. Do you recall anything about Mr. Norcross representing a committee of 12 appointed to see various people?

A. No, I do not.

Q. Do you recall about any committee being appointed, whether being headed by Mr. Norcross or not, to see various people about the matter of taking off these base prices at mills that didn't put them in themselves?

A. No, I do not.

Q. I am showing you papers marked for identification as 2625 and 2626. Do you recall that correspondence?

A. I wrote that letter, but I don't remember the correspondence.

Q. You wrote the letter which is marked 2626?

A. I wrote this letter (indicating). That is my signature.

Q. Does it appear to be a reply to the other, which is 2625?

A. I would think so. Our files, I think, would show. I would think so.

14397 (COM. EX. 2625 and 2626 were offered and received in evidence.)

14398 BAXTER D. McCLAIN, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden:

I am an attorney at present. I have not been engaged in the general practice of the law since 1922; I have been with the Lone Star International Cement Company since 1922. There were two periods when I was the manager of the Kansas City Division of The Cement Institute, one was during 1930 and the other was beginning with 14399 1933 to 1936. Between 1930 and 1933 I was in private practice. I will modify that by saying that about a year after The Cement Institute quit, in 1930, I again started in and organized a local trade association similar to what had been conducted by me prior to The Institute under the heading of the Kansas City Cement Bureau. The Kansas City Cement Bureau functioned from about the beginning of 1927 to the beginning of 1930.

Q. Showing you a paper marked Commission's Exhibit 1081-M, for identification, is that your signature at the bottom of the paper?

A. That is my signature, and that is my letter of that date. Let me see. Connected with that, it is the time of the old Bureau organization, and then the Institute took over.

14400 Q. In other words, did the Kansas City Division of the Cement Institute take over the activities of the Kansas City Cement Bureau that you refer to?

A. They didn't take it over; they just stepped in when the other one was discontinued.

Mr. Wooden: This Exhibit 1081-M, Your Honor, I think is pending, althouh an offer was made of it, I believe, in Chicago. The identification has been completed and so I reoffer it at this time.

Mr. Leisure: It is already in evidence.

Trial Examiner Norwood: He said this is already in evidence.

Mr. Wooden: I am sorry.

Trial Examiner Norwood: I don't recall it.

Mr. Wooden: It isn't marked by the Reporter,—stamped as in evidence.

(COM. EX 1081-M was offered and received in evidence.)

Q. Can you name the members of the Kansas City Division of the Institute, Mr. McClain?

A. You mean the corporate members?

14401 Q. Yes.

A. Companies that were members?

Q. Yes.

A. I know them. I don't know whether I can remember them all or not.

Q. Name them the best you can.

A. Well, there is the Ash Grove and the Dewey, the Lone Star, the Consolidated, the Monarch and the Missouri and the Oklahoma, Nebraska and Arkansas.

Q. Were those—

A. (Interrupting) That ought to be nine or ten.

Q. I didn't count them. Were those that you have named also members of the Kansas City Cement Bureau?

A. Those that were in existence were. At the time the Bureau was organized the Arkansas Company and I don't know whether the Superior, Nebraska Company was in existence, but as they were built they came in.

Q. Did the Kansas City Cement Bureau—or, I mean the—was there any connection between the territory covered by the Kansas City Cement Bureau and any district of the Cement Institute as later formed?

A. They were both District 8 of the Bureau of Mines.

Q. What was the form of organization of the Kansas City Cement Bureau?

A. It was a trade association.

14402 Q. With the usual officers?

A. Well, I don't remember what officers there were: I was the only one I paid any attention to. They asked me to manage the thing when they organized—another man who organized it.

Q. Who was that?

A. Mr. Norcross, who had formerly been with the Cement Statistics or some such concern here some six, eight or ten years before.

Q. Was there some interim between the passing of that Norcross organization and the organization of the Kansas City Cement Bureau?

A. I suppose so, but I don't know that. Briefly, they asked me to manage it and I investigated it and started it. Mr. Norcross had found something else that he wanted to follow up. What it was; or when, I do not recall.

Q. Was he managing some similar organization when you started the Cement Bureau?

A. No.

Q. Did you start the organization or were you with the Cement Bureau at the time of its organization?

A. As I say, I took up this plan that had been worked up by Mr. Norcross but hadn't been started. It was similar to the organization that had been started some

14403 eight or ten years before and then discontinued.

Q. Did you tell us the first year of your connection with the Cement Bureau?

A. It is a matter of thinking it out.

Q. All right.

A. 1927. It was late in 1926, in December, when I told them I would head it.

Q. Did you have a Board of Directors or anything like that in the Cement Bureau?

A. I don't think so. We had a very loose organization. I think we had trustees,—maybe three, that is all; somebody to look after the interests.

Q. Can you name the trustees?

A. I can't tell you that. They changed every year.

Q. Name any of them.

A. Well, sometimes Mr. Sunderland, Mr. Tyler, Mr. Wolf.

Q. Mr. Wolf of the Monarch?

A. Yes. He is since deceased. Mr. LeHaney.

14404 Q. Who?

A. Mr. LeHaney.

Q. Who is Mr. LeHaney?

A. He is vice president of the Lone Star.

Q. Who? LeHaney?

A. I don't recall; they changed every year.

Q. Did you have regular meetings?

A. As the Bureau, no, but as the group, we had monthly meetings at my instance.

Q. What was the idea of having monthly meetings as a group and not as the Bureau?

A. Well, I am not saying that there was any idea about it. I didn't know all these people when I started in. I wanted to be acquainted with them, and I felt that in a co-operative association like that, that it would be helpful to have meetings at reasonable intervals.

Q. What was the character of the matters brought up at such monthly meetings?

A. Oh, the routine matters of the Bureau, in so far as dues and in so far as things of that kind, and then the rest of it was most anything would come up; it was more of a social than a business affair.

Q. Did you discuss competitive conditions?

A. No, sir. I say, discuss it. I mean as a group, no. They may have gotten off together and discussed

14405 some competitive problem, or that, I don't know. I never heard it.

Q. What was the one thing that you said that they did discuss at such meetings? The dues?

A. The dues and possibly some of the reports, I don't know, that I issued.

Q. What reports did you issue?

A. There were filed contract reports, specific contracts; there were filed monthly shipments to the various states; and there were credit reports. Those were put out monthly.

Q. What were the dues based on?

A. The dues were based on, as I remember, the capacity of the mills, the potential capacity of the mills, as carried by the Bureau of Mines.

Q. Did the Bureau of Mines publish the capacity of each mill separately?

A. Well, I say, the Bureau of Mines. I assume they got it from that Bureau because I don't know where else they got it. But that was a matter that was determined at the time they organized the Bureau and before I took charge of it. I don't know anything about it.

Q. What would you say as to whether it was based on the capacity as reported to the Bureau of Mines instead of reported by the Bureau of Mines?

A. Well, I should say reported to, yes.

14406 Q. Yes.

A. The Bureau of Mines is not taking that end of it, of course. They receive, of course.

Q. What was the idea in having the reports of shipments to states?

A. That made the total of the business as done in the district.

Q. What was the idea in having it separated by states?

A. That was the only way—that is the way the compilation came in, came in by states.

Q. Was that a special compilation for that purpose, or was that one made up in the ordinary course of business?

A. Ordinary course of business, the easiest way to handle it.

Q. What was the difference between the statistics that your office put out and the statistics put out by the Bureau of Mines?

A. I don't know what difference there was any more than the statistics that I put out pertained only to District 8.

Q. Well,—

A. The Bureau of Mines covered all the districts.

Q. Yes. But as to District 8, the Bureau of Mines' figures for District 8?

A. I don't know. I never analyzed to see what the particular difference was, because the set-up came

14407 in a different way.

Q. You weren't duplicating the work of the Bureau of Mines in that respect, were you?

A. No, no, we were localizing it, I should say.

Q. You mean so far as District 8 is concerned?

A. No.

Q. Not duplicating that either?

A. What is that?

Q. You were not duplicating the work of the Bureau of Mines for District No. 8 either?

A. Only as the set-ups that we had, there would naturally be some duplication, but not complete.

Q. Not complete.

What did your Bureau have to do with the subject of freight rates, if any?

A. The Bureau—the Kansas City Cement Bureau?

Q. Yes.

A. Nothing.

Q. Did you collect any freight rate information or put out any freight rate information?

A. Nothing. During that period the companies had their own freight service.

Q. During the entire period of the Bureau?

A. As I recall it now, yes.

Q. When did that condition cease?

14408 A. When the Institute took over the proposition, it was then discussed, Institute freight rate books, but in the meantime I employed a rate man for whatever services might be necessary in connection with that proposal, and he sat in the office and checked rates, that is the new rates that came in, contacted, I think probably, some of the companies, but I don't know that anything was done because the Institute ceased to function before any arrangement was made for freight rates at that time.

Q. As I understand it, this man you employed was working on freight rates in connection with the proposal of The Institute to provide freight rate service?

A. No, no.

Q. Well, what?

A. There was sort of an interlude between in anticipation of what The Institute intended to do in the way of promulgating freight rates.

Q. Had anything preceded his work along freight rate lines?

A. Not that I know of.

Q. Did you ever hear of the Iola Cement Traffic Association?

A. I have heard of it. I don't know anything about it.

Q. You don't know anything about it.

Did the Cement Bureau, Kansas Cit. Cement Bureau, have a constitution and by-laws?

14409 A. Yes.

Q. Did it also have a code of ethics?

A. Not that I know of.

Q. Are you sure of that?

A. That is my recollection.

14410 Q. Did you ever have any correspondence with Mr. Luther McConnell?

A. Quite a bit after the Institute was organized.

Q. What do you say as to that handwriting being that of Mr. McConnell?

A. I don't recall enough of his handwriting to tell you.

Q. All right. I refer to Exhibit 140-13. The year 1929 appears thereon. Does that refresh your recollection as to whether or not there was any code or proposal of a code at that time?

A. It does not. I will say this: There may have been a proposal of a Code but I know nothing about it.

Q. Is it possible that there was a code that you wouldn't have known anything about?

A. I don't think so. There could have been and my not knowing it because it had nothing to do with my conduct of that office,—of that Bureau.

Q. Were matters discussed at these monthly meetings that you refer to, any of the matters that are set forth in this paper, 140-5 to 140-13?

A. Well, I haven't read it all. I suppose some of the items were informally and incidentally because it was not a part of the meeting. The meeting was simply an open meeting for the discussion of whatever the men wanted to do.

Q. How about standardization of sales contracts?

14411 A. I wouldn't—

Q. (Interrupting) At such discussions?

A. I don't recall. Might have been some discussion of it, but I don't recall any of it.

Q. How about making open broadcast quotations to the trade of changes in price and so on?

A. I don't think I ever heard anything of that.

Q. Any discussion of secret rebates and concessions?

A. Oh, there were discussions of the violations of ordinary trade practices and things of that kind, but no specific things and no general rules. They would be incidents.

Q. What else do you class as ordinary trade practices?

A. What was generally known in the business, in accepted policies of the companies. I don't know whether they were ever compiled or anything of the kind.

Q. There were some recognized ethics of the trade?

A. Most certainly, because you couldn't run a business for 20 or 30 years and build it up without having that.

Q. Were such matters as diversion discussed at any of these monthly meetings?

A. Oh, I suppose there was, but I don't recall any. It would be an incident.

Q. Any discussion at such meetings regarding selling below cost?

14412 A. I wouldn't say so, no. I don't recall any. There might have been, but I don't recall any.

Mr. Wooden: Your Honor, I think Mr. Sunderland testified that there was a code of ethics of the Kansas City Cement Bureau. I am asking that that code be produced.

Mr. Leisure: Mr. Sunderland did not so testify according to my recollection.

Mr. Wooden: The record will have to show on that.

Mr. Leisure: That has not been identified in any way. I submit there is no basis for that document at this time at all. It certainly wasn't identified by this witness.

Trial Examiner Norwood: Is there an identification number on that?

Mr. Wooden: Yes; 140-5-13.

14415 Trial Examiner Norwood: I shall retain this exhibit.

By Mr. Wooden:

Q. Showing you a paper, Mr. McClain, marked 202-V for identification. Do you recall receiving the orig-

14416 inal of that paper?

A. I don't recall receiving it, no; but it is quite likely I did. I know the matter was up that is discussed in there.

Q. Do you recall forwarding something regarding that matter to Mr. Reiter?

A. No, I don't. I have no independent recollection outside of this letter. Of course, if I say so, I did.

Q. Does the letter refresh your recollection?

A. Only to that extent. I don't know what it was.

Mr. Wooden: Your Honor, I am offering at this time this paper marked 202-V for identification. It was iden-

tified in Washington by J. W. Powers as a copy of a document from the files of Mr. Reiter, Manager of the Cement Institute.

Mr. MacIntyre: Off the record.

Trial Examiner Norwood: Off the record.

(A discussion ensued off the record.)

Mr. Leisure: We have no objection.

(COM. EX. 202-V was offered and received in evidence.)

Q. Do you recall whether or not, Mr. McClain,
14417 you communicated with the Monarch Cement Company as suggested by Mr. Reiter?

A. Independently, no; but I assume I did if I promised to.

Q. In the conduct of your office of the Kansas City Division of the Cement Institute did you come in contact with a practice or any instances where some companies shipped for the account of other companies?

A. I have no knowledge of it. I heard it talked. Whether they did or not, I don't know.

Q. Did they talk about such things at these meetings you refer to?

A. No, no. I am speaking of individual conversations.

Q. Did you know of it being done, then? Is that what you mean?

A. Why, I heard occasionally that that had been done, but, as I say, by simply personal talk by somebody else. I don't know whether it was ever done myself.

14418 Q. Do you know of any of the conditions under which it was done?

A. No, sir. I mean—what do you mean by that?

Q. Circumstances.

A. I know the general conditions or knew at the time the general conditions there. Of course, if it were done, it would be under those, but I don't have any relation between the two.

Q. Under what conditions you refer to would it be done?

A. I am using your statement. I don't refer to any conditions. I am asking your use of the word "conditions".

Q. Perhaps I should say "circumstances."

A. How?

Q. I should say "circumstances" instead of "conditions".

A. Well, whichever way you want to put it, I was not a party to it is the point I am making. If I heard it, I only

heard it incidentally. I don't know as I heard it very many times. I have heard of it.

Q. Showing you Exhibit 2623, and referring you to the third paragraph of that letter—

A. This one (indicating)?

Q. Yes.

A. I don't know a thing about it.

Q. There is a reference there to Mr. McClain's report?

A. Well, those are reports of shipments.

14419 Q. You say you know nothing about it?

A. I wouldn't know nothing—I would know nothing about it unless I happened to hear of it incidentally, if it occurred. I don't know that it occurred.

Q. Who was this traffic man that you employed to work on freight rates pending the formation of the Institute service?

A. His name was O'Connell.

Q. O'Connell?

A. O'Connell.

Q. Where is he now?

A. I don't know. I haven't seen him for years.

Q. Is he connected with some local or district company?

A. I don't know.

Q. What is his first name, do you know that?

A. I don't know that. If I were to need him very badly myself, I wouldn't know who to ask for or how to get him.

Q. Were any of the results of your traffic man's work distributed to the membership of the Bureau?

A. Only as he would sometimes be asked to check up some rate, whether there was a change in rate, or something of that sort. I don't recall of any of it, but whatever he worked out, that would be to the benefit of any members of the Bureau.

Q. You mean a rate on some particular shipment?

A. No, no; some particular destination.

14420 Q. Not a service that he rendered to the membership as a regular thing?

A. Oh, no, no.

Q. What became of the files of the Kansas City Cement Bureau?

A. Well, I threw them away, I think, when the Institute took it over. I didn't have any use for it—any further use for it. I may have retained some of them, but I don't know where they are now.

Q. Showing you Exhibit No. 141-27, is that your signature to that document?

A. That is my signature.

Q. I notice in the third paragraph of your letter, 141-27, you say that the members seem to be unwilling to get rid of any prospective business. That is in connection with the matter of checking contracts.

Can you name any members that were unwilling to get rid of prospective business?

A. No, I don't recall that. I don't really know what it means now.

Q. Well, just prior to that you said you were disappointed at the reaction of the members to the disposition of the contracts as booked, especially in the larger cities, "For they seemed to be unwilling to get rid of any prospective business."

14421 A. I have nothing to add to that. That says just what I said then. Checking the contracts, you know, is one of the activities of the Cement Institute.

Q. Yes, sir. And was it one of the activities of the Cement Bureau before the Institute was formed?

A. No. Oh, it was provided for, but I never did it.

Q. What do you mean, you never did it under the Cement Bureau?

A. No, I considered it a waste of time.

Q. Showing you Exhibit 141-65, is that your signature to that document?

A. Yes, sir.

Q. A letter to Mr. McConnell?

A. (No response.)

Q. You refer here to contract checking and say that "Wichita is back in the old Bureau squabble with some loose cement hard to locate but demoralizing in effect."

What do you mean by "loose, old cement"?

A. That is too long ago to recall, but I assume that it was—by loose, old cement, cement that the origin of it I couldn't ascertain. I don't know as to who shipped it. I don't know that that is what I meant, but that would probably be what is was.

Q. What about loose, old cement in the hands of dealers or under contracts with manufacturers?

14422 A. I don't know. I really don't know what I mean by that, to be frank about it. It was so long ago. What date was that?

Q. August 2, 1930.

A. Yes.

Q. How would loose, old cement have a demoralizing effect?

A. As long as—it could have a demoralizing effect as long as there was cement existing that had been bought for a specific purpose and not used thereon, and at a lower rate, it would have a demoralizing effect on the market.

Q. Particularly if the market should show an advance?

A. Yes, or even a stability, there would be an opportunity to handle loose cement there that was not tied up to any obligation.

Q. Showing you Exhibit 638-F, do you recall receiving that letter from Reither?

A. I don't know the name of this man. I recall receiving a letter from some man who was going to California.

Q. Did he stop to see you?

A. This man that I have in mind did, if it is that man. I don't know.

Q. What did you talk about?

A. We talked about the Bureau, The Cement Institute activities in my office, forms, reports.

Q. Did you describe to him how you ran your 14423 office and what the various functions you performed were?

A. In a general way, in connection with the blanks we used. In other words, he was starting an office, and I gave him that information.

Q. Showing you Exhibit 1035-A, is that your signature to that?

A. It is.

Q. And 1035-B, do you recall that?

A. I do not.

Q. Referring to 1035-A, will you say that 1035-B is the enclosure which 1035-A, your letter, refers to?

A. Yes, that is in regard to dues.

Q. Referring to the fourth paragraph of 1035-A, who were the Chicago people that you talked about coming down?

A. There are two or three companies whose local officers are general managers and not elective officers of the corporation: Lehigh, Universal Atlas, and Consolidated.

Q. Is that what you meant by the Chicago people?

A. That is what I meant.

Q. You had in attendance at these meetings, did you, from time to time, parties from outside of the district?

A. Well, when questions of dues or—either in the Institute or in the old Bureau or the Portland Cement Association were involved, there was some one usually came from up there; otherwise, they did not.

14424 Q. You mean to say that people would come all the way from Chicago to talk about dues?

A. The apportionment of the dues.

Q. Yes.

A. Sure, the first would be the amount of dues; the second would be the apportionment.

Q. Did you have dues paid in to the division by concerns who had no mills located in a division?

A. Oh, no, no.

Q. Did you collect any dues on shipments into the district from mills outside of the district?

A. None whatever. The dues I am talking about were for promotional work.

Q. Is that what you mean by special dues in Exhibit 1035-B (indicating)?

14425 A. I don't remember what that refers to there beyond what it states in the letter.

Q. Was the Nebraska Company of Mr. Boettcher's organization a member of the district,—Kansas City district?

A. Yes sir.

Q. Will you explain what the "special dues based upon shipments made into the district" means as referred to in 1035-B?

A. Well, I don't know why I should have used the word "special dues" except those were his dues of the shipments of his mills into the district. I didn't get dues on shipments that went out of the district. All I got dues from these mills is on shipments that were in the district.

Q. Do I understand you did or did not get dues on shipments into the district from outside mills?

A. Did not.

Q. Showing you Exhibit 2249, Mr. McClain; does the first paragraph of that document recall anything to your mind about the committee that is referred to there?

A. I don't know anything about it. Never heard of it that I know of.

Mr. Wooden: I have nothing further.

Mr. Leisure: I have no questions.

14429 W. S. BARTON, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am traffic manager for the Ash Grove Lime & Portland Cement Company and have held that position since about 1924, I believe. My duties in that capacity consist of handling all the railroad and transportation problems
14430 and quotations of the freight rates for our sales department, and routing and tracing of cars and handling of freight claims. I handle the traffic problems of the Nebraska mill as well as the Chanute mill.

Q. Is there what is known as a blanket rate from the gas belt mills after a certain distance is reached from those mills?

A. Yes sir. To certain territories they are grouped into—after we reach the edge of a certain territory they are blanketed.

Q. What is the area or the territory to which you refer?

A. Approximately 80 miles, I believe the order read. It is either 70 or 80, but I believe it is 80 miles.

Q. 80 miles from where?

A. From the mill.

Q. From what mill?

A. Well, from each mill. A rate for a distance of 80 miles, they would take their own mileage scale rate.

Q. Within 80 miles, you mean?

A. Within the 80 mile area.

Q. Yes.

A. After you got away from that, so that the destination was outside of that territory, the group would become a unit.

14431 Q. All mills on the same rate after the 80 mile limit is reached, is that right?

A. That is correct.

Q. What mills are included in that 80 mile blanket rate?

A. Well, it was Iola, Humboldt, Chanute, Independence, Fredonia, Kansas, and Dewey, Oklahoma.

Now, there was a mill that was at Fort Scott that was in a group in the tariffs, but it doesn't manufacture the same kind of cement so I don't pay any attention to that at all.

Q. Within that area what is the range or variation of rates from different mills?

A. Well, without a check I couldn't tell you. I would say a cent or maybe a cent and a half or maybe a half a cent.

Q. Per hundred pounds?

A. Per hundred pounds, yes.

Q. Can you give us some of the towns that fell within that area where the rates from the various mills are not the same?

14432 The Witness: You said from the mill inside the 80 mile area, didn't you?

By Mr. Wooden:

Q. The area within which the rates were not blanketed.

A. Yes.

Q. What are some of the towns in there that you might say mark the outer edge of that area?

A. Just that question again.

Q. What are some of the towns in there that mark the outer edge of that area?

A. Well, I would say Pontiac, Kansas, might be one on the west, and Overbrook, Kansas, may be on the north,—probably we get out as far as Foster, Missouri, just across the line in Missouri, on the east. On the south I wouldn't like to say because Dewey is in the State of Oklahoma and I would have to check that before I would be positive what an 80 mile town was.

Q. How about Fort Scott?

A. Well, that would be—you mean in a difference in rates?

Q. Yes.

A. If you included Fort Scott in this Portland Cement area, why, it would extend on further east.

Q. My question is whether Fort Scott is out-
14433 side the 80 mile or inside the 80 mile limit?

A. You mean if we were shipping from one of these mills that I mentioned to Fort Scott?

Q. Yes.

A. That would be inside of the 80 mile area.

14434 Q. How about Olathe, Kansas?

A. It is just about on the northern end. You will have to check to be sure just about where.

Q. After you get beyond this 80-mile limit, do I understand that no matter how great the distance, shipment

is made, and that then the rates from all these mills is the same?

A. Generally speaking, that is correct, yes, sir, to this, as we call it, Washington trunk line territory, but, of course,—

Mr. Leisure: You mean the same destination, don't you, Mr. Wooden?

Mr. Wooden: Pardon?

Mr. Leisure: You mean by that question, to the same destination?

Mr. Wooden: Oh, surely.

By Mr. Wooden:

Q. Do you have anything to do with the figuring of delivered prices?

A. No, sir.

Q. Do you know how the freight factor within this 80-mile zone—I will call it a zone, if I may—

A. That is right.

Q. —is equalized between the different mills?

A. You mean as to prices?

14435 Q. As to delivered prices.

A. No, sir.

Q. Do you handle invoices?

A. No, sir.

Q. What is the range of size cars that are shipped by your company?

A. Well, the minimum car is 50,160 pounds. That would be 132 barrels, and they range up to probably 300 barrels.

Q. That is how many pounds?

A. About 120,000, somewhere in that neighborhood. It depends on the size of car—I mean, the size or order whether you put it in two cars or one.

Q. You don't have any 40,000-pound cars?

A. No, sir.

Q. Or anything less than 50,000, you say; is that right?

A. Well, not in—we do in the State of Nebraska on intrastate traffic.

Q. You do have what?

A. We have a lower minimum on strictly state traffic in Nebraska.

Q. Lower than 50,000?

A. Yes, with a higher rate.

Q. Do you actually ship cars of less than 50,000 there?

A. I don't recall of only one or two instances where a dealer ordered a car less than 50,000 pounds.

14436 Q. Do you have dealers who order and receive 60,000-pound cars?

A. Yes, sir.

Q. Do you have some of them who receive 80,000-pound cars?

A. Yes, sir.

Q. Has that been generally true over a period of years?

A. Well, the 60,000-pound has been in effect for a number of years. That is another Kansas state rate.

Q. Well, I wasn't referring to the rate as much as to the actual size of shipment?

A. Well, 50,000 is the general run of cars. On a big road job, or something, probably would take a very large car.

Q. Do you have some 80,000-pound cars coming into Kansas City, for instance?

A. I don't recall of any that we have shipped into Kansas City of 80,000 pounds for just general use; it might have been for some road job or going through Kansas City to some road job, but just as a dealer sale, I don't believe I recall any at all.

Q. Road jobs, are those shipments made to contractors or what?

A. They are made in bulk to contractors, usually.

Q. Do you have any 80,000-pound car shipments made within this area where the rates are not blanketed?

A. Let me understand that question. Do I have

14437 any 80,000-pounds cars—

Q. Yes.

A. —shipped from the gas belt mills into this 80-mile area?

Q. Yes.

A. That I what?

Q. Well, that size cars.

A. I would have to check that. I will be glad to do that, but I don't recall of any.

Q. How about the Clianute mill?

A. Sir?

Q. Do you have any from the Chanute mill?

A. No, sir, not that I recall into that area there unless—

Q. Do you have some 80,000-pound cars that are shipped at two points that are outside the 80-mile limit?

A. We have 80-pound cars shipped, of course, whenever we get an order for that amount, and if we have a car with the capacity to hold it, we load it on the one car. I couldn't—

Q. That has been done?

A. Yes, we could ship any amount above 50,000 pounds.

Q. I am not getting at whether you can, but have you actually done so?

A. Well, I wouldn't like to specify. I will be glad to check it up.

14438 Q. Will you ascertain and let us know to what extent you have shipped 80,000-pound cars, and to what points? I mean, to what dealers, if any.

A. In that 80,000-mile area?

Q. Yes, within and without during a period, say, the year 1936.

Mr. Leisure: If your Honor please, we will check into that. That is a class of question which I feel should be directed to counsel.

I think there should be some offer of proof as to how it is material. I don't see the materiality at the moment.

Trial Examiner Norwood: Well, I think that all these things that go into these shipments here, the various things, are relevant.

Mr. Leisure: This is an open hearing and there should be no secrets. I don't see the materiality of whether or not he ships in a 50,000-pound car or an 80,000-pound car, and he is asking us to bring that evidence into court. I think I am entirely within my rights in raising the question. We should know how it proves or tends to prove any issues in the case, how it is material or relevant to the case in any way.

Mr. Wooden: It is just a general question, your Honor, of a general issue of the way freight rates are fig-

14439 ured and handled and the method of calculating freight rates, and so on, that has been an issue in the case from the outset, because delivered prices necessarily include freight rates.

The Witness: May I just ask a question?

Mr. Leisure: It doesn't appear that there is any different way so far in the record of figuring an 80,000-pound car or a 50,000-pound car.

The Witness: That is what I meant. There is no difference.

By Mr. Wooden:

Q. Do you use the freight rate books of The Cement Institute in your traffic department?

A. Not as quotations for rates. I figure my own freight rates or the freight rates for our company direct from the tariffs, and I take them right out of the tariffs that we are on the mailing list for, the complete file is sent to us by the railroads.

14440 Q. Do you make any use of the freight rate books of the Institute in your traffic work?

A. I have checked them during the winter months when the times are slack, to see if my rates harmonized with them, yes sir.

Q. Is that the only use you have made of them?

A. That is all.

Q. What have you found as to the extent of harmony between yours and the Institute books?

A. Well, you will find an error will creep in once in a while. I have found one or two. Last year I think is the last time I checked any of them against my own rate books, and when I do find those rates that are not reconciled I get the freight tariffs of the railroad out and see if I am right on it.

Q. Isn't the calculation and application of freight rates a matter on which even freight rate experts will differ at times?

A. Oh, absolutely.

Q. Are the differences sometimes rather substantial between two experts figuring the same rate?

A. Well, there may be. I have had variances, but if you can contact a fellow you usually find out who is right and who is wrong. One has got to be wrong and one is right, that is all there is to it. There is only one

14441 freight rate,—that is, a legal one.

By Trial Examiner Norwood:

Q. Couldn't two of them be wrong at the same time?

A. Well, they might. In that case, why, we would hit on a happy medium and we would get a right rate before we got our money back from the railroad, I can say that.

By Mr. Wooden:

Q. Do you keep any record on your books showing the total amount of freight paid the railroads by dealers to whom you make shipments?

A. No sir; not in the traffic department, no sir.

Q. Do you know of any kept in your company at all?
A. No.
Q. Do you know whether the railroads keep any account which shows the amount of freight paid by dealers on shipments of cement from your mill?
A. No sir.
Q. What do you mean by "no sir"?
A. You asked me if the railroads kept any. I wouldn't know what kind of an account the railroad kept.
Q. Aren't you familiar generally with that?
A. Only in the traffic and rate end; not with the accounting.

14442 J. A. LEHANEY, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. MacIntyre.

14443 I am the Vice-President and Manager of the Kansas Division of the Lone Star Cement Corporation and have held that position about 14 years. In that position I have general supervision of sales and to some extent operation. I have about 10 salesmen under my jurisdiction.
Q. How many salesmen do you have under your jurisdiction?
A. About 10.
Q. What States do they cover.
A. Well, generally all of Kansas, parts of Nebraska, parts of Iowa, part of Missouri, part of Oklahoma, part of Arkansas.
Q. Do they solicit sales of cement to be shipped from any mills other than the Kansas mill of the Lone Star Cement Corporation?
A. Yes. The men in Oklahoma and Arkansas solicit business for the mill at Dallas, Texas.
Q. As well as the mill at—
A. (Interrupting) Bonner Springs.
Q. (Continuing) Bonner Springs. May I ask,
14444 do they principally solicit for the Bonner Springs Mill?
A. Principally Bonner Springs, yes.

Q. And the other eight salesmen solicit entirely for shipments for Bonner Springs, do they?

A. That is right.

Q. Mr. LeHaney, I show you a document marked as Commission's Exhibit 874-M and ask you to state whether or not you recognize that and, if so, as what?

A. It is an inquiry regarding information in connection with cement required for the Fort Peck Dam in Montana.

This letter, however, was not written by me nor dictated by me, but I am somewhat familiar with the circumstances.

Q. Was it sent from your office to the addressee?

A. That is quite correct.

Q. I now show you document marked as Commission's Exhibit 874-O and ask you to state whether or not you recognize that as a letter from your office to the addressee, Mr. H. O. Warner?

A. Yes. It is a letter from this office discussing the same details.

Q. I now show you the documents marked as Commission's Exhibits 874-S and 874-T and ask you to state whether or not you recognize that as a letter from your office to the addressee, Mr. H. O. Warner?

14445 A. Yes. The letter was written from this office, but this pencil memorandum has nothing to do with it.

Q. I believe the pencil note has been identified as appearing in the handwriting of Mr. Chris Dobbins, Assistant Sales Manager of the Colorado Portland Cement Company at Denver.

A. I don't know about that.

Q. I am merely asking now about 874-S and 874-T.

14447 Q. Mr. LeHaney, I now show you an exhibit marked as Commission's Exhibit 874-S and 874-T, and I ask you to state whether or not you recognize that as a letter from your office to the addressee, Mr. H. O. Warner?

A. Yes, that was written in our office.

Q. To Mr. Warner?

A. Yes.

Q. Mr. LeHaney, I now show you a document marked as Commission's Exhibit 1848, and ask you to state whether or not you recognize that, and, if so, as what?

A. That was written in our office, not by me, however.
Q. With your authority?
A. Yes.
Q. For the purposes that appear from the document?
A. Yes.

Q. Mr. LeHaney, the Lone Star Cement Corporation subscribes to and furnishes to your office in Kansas City freight rate books of the Cement Institute?

A. Yes, we receive freight rate books from the
14448 Cement Institute.

Q. Are they furnished to your salesmen for use in the field?

A. Yes, they are.

Q. Do your salesmen use those in calculating delivered prices?

A. Well, our salesmen have been in the field a good many years, and they have picked up information covering a long period of time in these various territories, so that they are perfectly familiar with prices obtaining in the different market places.

Q. I don't believe that is an answer to my question, Mr. LeHaney.

I am asking now about the freight rate books of the Cement Institute. What use do your salesmen make of those? Do they use them in figuring—in calculating delivered prices at any time?

Mr. Leisure: I think the question has been answered. He said they have been.

Trial Examiner Norwood: I hardly think so.

Mr. Leisure: He said they have been in the field a great many years.

Trial Examiner Norwood: No.

Mr. Leisure: That they know what the prices are, which I think answers the question.

14449 Mr. Wooden: Oh, Mr. Leisure—Mr. Leisure, you ought to know that is not an answer to the question.

Mr. Leisure: Well, I think it is.

Mr. Wooden: It isn't.

Trial Examiner Norwood: Read the question, and I will ask the witness to make a more direct answer.

(Question read.)

A. Well, I will answer that in this way: our men have

been in the field for a number of years all over the different territories in which they are located.

By Mr. MacIntyre:

Q. Can't you answer the question, Mr. LeHaney, yes or no?

Mr. Leisure: Let him finish.

Trial Examiner Norwood: Let him finish.

A. And they during the course of those years have the experience and a rather complete knowledge of the prices obtaining in the different markets.

Mr. MacIntyre: If Your Honor please, the answer is not responsive, and I ask him to please answer the question as asked.

Trial Examiner Norwood: Now, I will ask counsel to sit down until he completes his answer, and then I will hear from him.

Now read that part of the answer so far as the 14450 witness has answered.

(Record read.)

A. (Continuing) We are shipping practically to the same markets day in and day out, week in and week out, so that they are all posted and have a full knowledge in regard to the prices in those towns or markets, as you describe them.

Trial Examiner Norwood: Is that all of your answer?

A. (Continuing) So to those supplemented by the information they get from the office as to rates, which we gather both from the freight tariffs and the books submitted by The Institute—

Trial Examiner Norwood: I am going to ask you to answer that question yes or no.

Read that question to him.

(Question read.)

Trial Examiner Norwood: Can you answer that yes or no?

Mr. Leisure: Which one of those, first? There are distinctly two questions.

Mr. MacIntyre: All right. Let us have the answer to the first one, to the first part of it. It is a single question, but let us have an answer first to the first part of it, and then to the second part.

Mr. Leisure: I object to the question and ask that it be

stated in one question at a time so the witness won't
14451 be confused.

Trial Examiner Norwood: I think that will be better.

Mr. MacIntyre: All right, if Your Honor please.

By Mr. MacIntyre:

Q. Now, Mr. LeHaney, I will ask you what use your salesmen make of the freight rate books of The Cement Institute that you furnish to them in the field?

A. They use those books in connection with the information that is furnished by the office and which they have picked up from time to time in the field as to prices at the different market places in their territory. In knowing what the prices are and learning what the prices are—

Q. Do they use them in calculation of delivered prices at any point or points?

A. They may at some time do that.

Q. Well, don't you know, as a matter of fact, whether they do or not?

A. Well, as I say, from the information that these men pick up in the field, they are so generally conversant with the prices in the towns, and we are shipping to the same towns week in and week out, that it becomes second nature to them to know just what the prices are.

Q. Mr. LeHaney, will you state whether or not you have instructed your salesmen to use those books
14452 for the purpose of determining delivered prices in the field?

A. They occasionally use them for that purpose with the qualification I have described.

Q. Well, I asked you if you have not instructed them to do so.

A. Oh, occasionally it may have been necessary for them to use the books in determining the price.

Q. And you so instructed them?

A. I perhaps think that was true in starting of the books, although the rates used before the rates were received from the Institute were pretty much along the same order as those that have been furnished, and their economical method of acquiring information that would cost a considerable sum of money, if any one institution had to assemble those rates and then double that up and multiply it a hundred times, it is a much more efficient and accurate

way of getting those rates. We only use them partially, however.

Q. Now, Mr. LeHaney, I think you answered the question a long time ago that I asked. I will ask you another one.

You have been with the Lone Star Cement Corporation 14 years in your present capacity?

A. Yes, sir.

Q. How many freight rate clerks do you now have in your traffic department in your Kansas City office?

A. Well, we have two that have to do with the

14453 rates and orders.

Q. How many freight rate experts that figured rates for you were employed when you came into the Kansas City office who worked under your supervision here?

A. Well, we had probably three men in that department at that time.

Q. All of them freight rate experts?

A. Oh, no, I am not classing them as freight experts, but I am classing them as men familiar with tariffs and who are engaged in the work of checking rates and using rates in our shipping, and all that sort of thing.

Q. Do the men that you now use in your traffic department as freight rate experts check published tariff rates as well as those from the Cement Institute freight rate books?

A. Oh, yes, that is a daily occurrence, checking the rates in the published tariffs of the carriers which we receive from time to time.

Q. Two men would constitute the entire personnel of your freight rate clerks in your present office of the traffic department at Kansas City?

A. In the Kansas City office, yes.

Q. How many traffic men, to your knowledge, does the Lone Star Cement Corporation employ in its New York office, Mr. LeHaney?

A. I really don't know.

14454 Q. That is, at the present time.

A. I don't know.

Q. There are some employed there who were not employed 14 years ago, to your knowledge, isn't there?

A. It is quite possible.

Q. Don't you know as a matter of fact whether or not there are some employees—

A. No, I don't. I can't answer that.

Q. —that serve your office here? You do get some freight rate service from your New York office now, do you not?

A. I don't think we get any.

14455 Q. Mr. Mahan, R. J. Mahan, General Traffic Manager of the Lone Star Cement Corporation in the New York office, never gives you any service so far as your traffic department here in Kansas City is concerned?

A. I didn't say that. We get his counsel and advice on matters as they come up in relation to traffic matters.

Q. Were you receiving such counsel and advice from the New York office of the Lone Star Cement Corporation 14 years ago?

A. Just about the same as we are today.

Q. Was there a New York office of the Lone Star Cement corporation or the International Cement Corporation fourteen years ago, Mr. LeHaney, in which Mr. Mahan or any other General Traffic Manager worked at that time from which you could receive any counsel as to freight rates?

A. Yes, there was.

Q. What office was that?

A. The office of the International Cement Corporation.

Q. And who gave you the service?

A. The Traffic Manager at that time was a man named Taylor.

Q. Is he still in the organization?

A. No sir.

Q. Do you know where he is?

A. Well, he is practically retired. I think he

14456 lives in Texas.

Q. Is he connected with the Lone Star Cement Corporation in Texas?

A. No, I don't think so.

Q. Now, I believe you have stated, Mr. LeHaney, that you instructed your salesmen to calculate delivered prices in some cases from the use of the freight rate books of the Cement Institute. Will you please tell us what factor that they add to the freight rates appearing in the freight rate book to secure the delivered prices that they calculate?

A. Well, as I said before, their knowledge of prices is so extensive in the territories in which they travel that it is seldom necessary to refer to any book; but we do fur-

nish information from the office occasionally where it is required to motivate those men in making prices,— determining prices.

Q. What kind of information is that that you furnish them in addition to the freight rate book of the Cement Institute?

A. Oh, rates applying from one point of production to destination points where the cement is being marketed.

Q. Do you mean rates—they have the rates in the freight rate books. What other information do you furnish them in addition to the rates appearing in the freight rate books of the Cement Institute that they can use as factors in addition to the freight rates in determining the

14457 delivered prices?

A. The routing and the minimum of the carloads and so forth.

Q. Well, do you mean that they merely use those as the total in the delivered price they quote without adding any other factor whatever so as to give you any return at the mill beyond the freight?

A. Well, they use our maximum net at the mill in calculating.

Q. You give them a list of those, do you?

A. I don't understand you.

Q. You said your maximum at the mill they would use as a factor in calculating those delivered prices in addition to the rates appearing in the freight rate books of the Cement Institute.

Now, I asked you to state whether or not you furnished them with a list of the maximum mill prices, or just what is the nature of the information that you furnish in that respect?

A. Oh, they have our maximum mill net at our mill at Bonner Springs, Kansas.

14458 Q. Do you give them any other maximum mill net or maximum mill prices, which ever way it may be described, other than that one applying at your Bonner Springs mill for their use as factors in adding to the freight rates in the Cement Institute freight rate books in their determination of the delivered prices?

A. I believe that they are familiar with the competition that has to be met in the territory in which they travel.

Q. I don't believe that is the answer to the question,

Mr. LeHaney. I asked you if you furnished them
14459 with any information as to the maximum mill nets or maximum mill prices, sometimes referred to in the industry as basing point prices, applying at other mills than the Bonner Springs mill for the use of these salesmen in their calculation of delivered prices along with their use of the Cement Institute freight rate books?

A. Well, these men naturally, in covering a territory such as Kansas, for instance, they learn from their experience what the competition is.

Q. That isn't the answer to the question, Mr. LeHaney. I am asking you whether or not you furnish them with such information as I have described. Can't you answer that "yes" or "no"?

A. Well, we have competition in Kansas, of course.

Q. Well, that isn't the answer to my question. I am asking you for an answer to my question "yes" or "no" as to whether you furnish them with the information I have described.

Will you answer as a matter of fact as to whether you do or do not furnish your salesmen with such information as I have described for their use in the manner that I have described?

Mr. Leisure: Could we have the question read?

Trial Examiner Norwood: Read the question, and I
14460 am going to ask the witness to please make a direct answer to that.

(The question was read by the Reporter.)

Trial Examiner Norwood: Now, answer that directly, please, sir.

By Mr. MacIntyre:

Q. That can be answered "yes" or "no" as a matter of fact, from the witness's knowledge.

Mr. Leisure: I submit it can't be answered "yes" or "no". It says "along with the freight rate books", and the witness hasn't testified that they take them along with the freight rate books, and it cannot be answered "yes" or "no".

Counsel is assuming part of the answer he wants in the question. He wants it to appear that they use them with the freight rate books, and the witness has not so testified.

Trial Examiner Norwood: He has testified that they use the freight rate books.

Mr. Leisure: Not as the question indicates, however.

Mr. Wooden: Well, can't he answer that question whether he does use them that way?

Mr. Leisure: The question,—I object to it. It assumes a statement of fact not in the record.

Mr. MacIntyre: If Your Honor please, I will
14461 put the question in still a different form and we will see—

Mr. Wooden: (Interrupting) It is in the record a thousand times.

Trial Examiner Norwood: Go ahead.

Mr. McIntyre: And we will see whether or not the witness can, from his own knowledge and as a matter of fact, answer the question.

By Mr. MacIntyre:

Q. Mr. LeHaney, I will ask you to state whether or not you furnish your salesmen with a list of prices that are described in the industry by your company and by others, in the past, as basing point prices and now referred to in the industry in many cases as maximum mill prices applying not only at the Bonner Springs mill but at other mills in this territory?

A. Men traveling in the State of Kansas, they might have the points of competition in the gas belt so they would know what their price is.

Trial Examiner Norwood: Wait a minute. I want you to answer that question and not some other question, and not answer it by giving some explanation of something else. Do you or do you not furnish those prices?

A. I was trying to answer, Mr. Examiner, that
14462 for instance in Kansas the men traveling in that State, of course, they would know that their competition is—

Trial Examiner Norwood: (Interrupting) I didn't ask you what they know. I am asking you what you furnish.

A. As to whether we furnish a list of those competitive producing points?

Trial Examiner Norwood: Yes.

Mr. MacIntyre: Basing point prices, now, sometimes referred to—

The Witness: (Interrupting) Not in the sense that you made the question at all. Those men only travel a very limited territory.

By Mr. MacIntyre:

Q. You mean you do not—do you mean to state as a matter of fact now, Mr. LeHaney, that you do not furnish your salesmen with a list of what is described by your company at times, and at other times described—described as basing point prices, and at other times described by your company as maximum mill prices, a list of them, applying not only to the Bonner Springs mill but the other mills in this territory, such as Dewey, Oklahoma, Mason City, Iowa—

Trial Examiner Norwood: (Interrupting) I will ask the counsel to ask shorter questions.

14463 A. Dewey, Oklahoma, I don't recall is a basing point.

Trial Examiner Norwood: You are involving your questions.

A. You are mentioning points that, to my knowledge of the territory, are not basing points.

By Trial Examiner Norwood:

Q. I will ask you if you furnish basing point prices of other mills to any of your salesmen?

A. We certainly wouldn't furnish any Mason City prices to a man out in Kansas, if that is what you mean.

Q. I asked you if you furnish any mill prices to your salesmen other than your own mill?

A. Why, in the territory that is affected—the mills that affect the territory in which he travels, he knows what those prices are.

Q. Do you furnish them or do you not? Yes or no.

A. We furnish them in a very limited way in the territory in which they solicit business.

Trial Examiner Norwood: Thank you.

Mr. MacIntyre: That is all, Mr. LeHaney.

Trial Examiner Norwood: Examine.

Mr. Leisure: I have no questions.

14465 BERNARD GLOVER, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am an attorney and commerce counsel in independent practice. There was a time when I was connected with an organization known as the Iola Cement Mills Traffic Association. I cannot give the exact years, but I would say it was practically from 1916 to 1917 to about 1933. My connection with it was that I was general traffic manager of the Association and I was also the commerce counsel in cases that I handled.

Q. Who were the members of the Iola Cement
14466 Mills Traffic Association?

A. Well, when we started out, there were probably about twelve different concerns. You want me to name all of them?

Q. Name as many as you can.

A. The Great Western Portland Cement Company at Mildred, Kansas, Iola Portland Cement Company at Iola, Kansas, Monarch Cement Company at Humboldt, Kansas, Ash Grove Lime and Portland Cement Company at Chanute, Kansas, Fredonia Portland Cement Company at Fredonia, Kansas, Western States Portland Cement Company at Independence, Dewey Portland Cement Company at Dewey, and in addition to those there were several that went out of business, among those the Altoona Portland Cement Company, and I couldn't very well remember the balance of them. The Bonner may have been one of them.

Q. During your connection with the Association, did the plant at Iola go into the hands of the Lehigh Company?

A. I didn't hear the first part of your question.

(Question read.)

A. It did, and when they did, they went out and were no longer a member of the Iola Association.

Q. No longer a member?

A. No.

Q. Did the plant at Fredonia go into the hands of the Consolidated Company while you were with the Association?

14467 A. Yes, and I believe they were not a member of the Association, at least, during the last several years of its existence.

Q. What about the plant that you named at Independence? Did that go into the hands of the Universal Atlas during your connection with the Association?

A. Yes, sir.

Q. Did it continue as a member of the Association thereafter?

A. No, I think not.

Q. What became of that plant at Mildred, Kansas? Did it go into the hands of some other concern?

A. Yes, the same as the Fredonia Company.

Q. Do you mean it went into the hands of the Consolidated?

A. Yes, that is what I understand.

Q. What was the scope of the activities of this Iola Cement Mill Traffic Association?

A. What led up to the Iola Cement Mill Traffic Association was the fact that certain of the mills, mainly the larger mills in the district, had decided that their freight rate adjustment was not satisfactory, and they decided to bring proceedings before the Interstate Commerce Commission and the State Commission of Kansas to obtain a revision of their freight rates; and we had filed a case or two before the Interstate Commerce Commission, and at the suggestion of an attorney, whom the several

14468 mills employed and who was located in Chicago—he suggested that a name be used to describe the mills in that district. He mentioned the fact that there was a paper mill association up in Wisconsin, as I recall it, and he said "Why not call it the Iola Cement Mill Traffic Association"?

Well, Iola having been the first and oldest mill in the district, why, that name was adopted.

Q. Wherein was the freight relationship unsatisfactory that you have said the association tried to correct?

A. Well, practically to all destinations when we started out. It was considered not satsfactory.

Q. Well, I don't mean where, but in what respects was it unsatisfactory?

A. Oh, well, the rates were too high; that is, they were unreasonable per se, and then they were discriminatory and unduly preferential is what we contended.

Q. Were the rates at that time from the mills in this district on a distance basis to all points?

A. No. At the time we instituted these proceedings, they were not on a distance basis.

Q. Had the so-called blanket rates beyond the 80-mile zone been established before the association was established?

A. No, that had nothing to do with it.

Q. They were established before the association
14469 was established?

A. Well, now, you say the blanket rates existed prior to the Iola Association? Is that what you had in mind?

Q. Yes.

A. That is correct. Most all the mills in the district, and I would say all of them, generally speaking, were grouped at the same rate, generally speaking, to most destinations.

Q. What did the association have to do with rates, if anything, within that 80-mile zone limit?

A. Well, now, let's see. I don't quite understand what you want, the information you want, but I will say that after this proceeding before the Interstate Commerce Commission, being an individual complaint filed by several of the mills in the gas belt, and probably later all of them joined, and when it became the Iola Association, most of them were members of that association.

At that time we had what we called specific rates to all destinations practically, and they were based on grouping of the cement mills in the gas belt at one rate, you understand.

Q. And regardless of area or distance?

A. Well, they didn't pay much attention to distance at that time. They tried to group them, and to all destinations. I wouldn't say they were grouped to short distance points, but this is the situation generally.

14470 Now, later on, when the Interstate Commerce Commission decided on a new plan of rates and held that the grouping should continue, then the question of to what territory—then the question arose as to what destinations they should be grouped, that is, what near destinations, and, as I recall it, the railroads kind of worked it out on their own plan, that they would group them beyond a certain distance, and I cannot remember whether that is

80 miles or not. But this matter of 80 miles did come into existence in connection with an investigation instituted by the Interstate Commerce Commission to determine whether the rates prescribed by the Commission within the short areas from the cement mills were reasonable per se. That brought on an investigation, which I believe I recall as the 80-mile investigation.

Q. Was that 80-mile investigation during the life of the Iola Cement Traffic Association?

A. Yes, sir. Yes, sir.

Q. State whether or not the cement mills in the association favored the blanket rate beyond some area such as 80 miles?

A. The mills in the Kansas gas belt, and I would say each one of them—there might be one exception or so—favored the grouping of the gas belt mills, generally speaking, to all destinations.

14471 Q. So that all mills had the same rate?

A. That is correct, because that was the basis that existed long before.

Q. If that was the basis that existed long before, how did it come up again in the so-called 80-mile investigation?

A. Well, the Interstate Commission instituted this investigation, which I believe was Docket 12911, to determine whether or not the rates for short distances from mills were reasonable or not. Of course, that arose, I believe, by reason of a complaint of the gas belt mills, which they had brought previous to that, complaining of the rates to Kansas City.

Now, I haven't looked up any papers, and you have a map there before you that I saw, but I don't know whether that is the particular map or not.

Q. At that time were the rates to Kansas City different from the different mills?

A. Well, the rate from all the gas belt mills to Kansas City were the same.

Q. At that time?

A. There might have been this one distinction, that the rates in intrastate on the Kansas side may have been different from those to Kansas City, Missouri.

Q. You think that was the case?

A. I think it was at one time.

14472 Mr. Leisure: May we have the time fixed on that?

By Mr. Wooden:

Q. You think it was at the time this I. C. C. 80-mile investigation began?

A. Well, I rather think it was because that rate was brought about by the Kansas Commission where they fixed the rate, as I recall it, on a minimum of 80,000 pounds and fixed it lower than the rate that had been fixed for a lower minimum.

14473 Q. Well, how did the 80,000 pounds minimum come into the picture? Just explain what bearing that had.

A. Well, in our complaint before the Kansas Commission we were anxious to get a rate as low as we could from the gas belt to Kansas City. That, of course, would include Kansas City, Kansas, and not Kansas City, Missouri.

And we stated that inasmuch as Kansas City was a large market that we could stand a high minimum to Kansas City and would prefer a lower rate on the high minimum than to just having one rate on the lower minimum.

Now, that rate by being applied to Kansas City on this 80,000 pound minimum was blanket back, of course, so it wouldn't be higher at intermediate points from all mills to the different lines that ran into Kansas City.

Q. State whether or not the outcome of that 80 mile investigation was to make the rates to a number of destinations the same for all the gas belt mills?

14475 A. Well, I am just a little bit confused whether—if you got any paper there that I can look at to refresh my memory—I don't know the—as I recall that 80 mile investigation, it didn't change the rates to the nearer points, but they had to group these mills beginning at some distance, and, as I recall, they elected either 70 miles 14476 or 80 miles as a convenient point to start to group them, and that, I believe, was the suggestion of the railroads because if you tried to group them ten miles from a point it would be just out of reason.

By Mr. Wooden:

Q. What variation in rates remained within the zone, or whatever area it was, 70 or 80 miles, or whatever you call it?

Mr. Leisure: So that I won't have to object to each question, I want to have one objection to this line of testimony.

Trial Examiner Norwood: Yes.

Mr. Leisure: That the questions are incompetent, irrelevant and immaterial and entirely outside of the scope of the issues provided by the pleadings.

Trial Examiner Norwood: Counsel has his exception to the entire line.

Go ahead.

A. Well, I would say a point ten miles from Iola, that is a destination, that the rate from another point in the district, that is Independence, for instance, might be 2 cents or more higher.

By Mr. Wooden:

Q. Did the Iowa Cement Traffic Association compile any information regarding rates on cement within 14477 that 80 mile zone?

A. Well, I am quite sure we had every rate mileage that—all the possible territory of the gas belt mills,—all the possible territory that the gas belt mills might reach, compiled.

Now, whether we made a special compilation of the territory within 80 miles for any particular purpose I am not sure. I know we had some kind of investigation but it is not clear in my mind just the scope of it.

Q. Did the Association distribute to its members information showing the rates from any point within the gas belt to destinations within that 80 mile zone?

A. Well, not any particular information applicable alone to the 80 mile territory.

Q. Did it put out any information which showed the rates from the various mills to points of delivery, regardless of whether it was within or without the 80 mile zone?

A. Well, when we started on our work to prepare for these Interstate Commerce cases, as well as the State cases, we prepared a compilation of existing rates, the routing, the tariff that named the rate in various book forms, which was for use only of our office in compiling exhibits for proceedings before the Interstate Commerce Commission or the State Commission.

Now, I suppose your question, perhaps, is did we 14478 furnish rate information to the members.

Q. Yes.

A. Well, we furnished information to the members in connection with instances where—for instance, I or my department felt that the rates were out of line to a given

territory, we would write the members and tell them that our rates to this territory are certain figures and asked their consideration of whether we should bring a complaint involving those rates, and, of course, having compiled all of this information as to rates we would very frequently, under the name of the Iola Association, furnish whatever traffic information of a general nature that they might request.

Q. Did you furnish anything of a regular recurring character without request, without special request?

A. I would say that any time there were changes in rates, reductions or advances, from any mills in the territory that might serve the territory which the gas belt might undertake to ship to, that we would keep the mills advised of any changes.

Q. Did you keep them advised of any changes from all shipping points or just certain shipping points?

A. Well, generally speaking we would give them the information from all the cement mill points that were within the destination territory to which the gas
14479 belt undertook to ship, as well as those on the fringe of it, or might be sufficiently near to make some difference, you see.

Q. Do you know what use was made by the mills of your freight rate information?

A. No, I don't know.

Q. Did your association prepare and distribute certain forms that might be used by the members regarding freight rate applications?

A. Well, all we did was to give them devices of any freight tariff changes in freight rates, the reductions or advances,—why, we just advised them what the new rates would be.

Q. I am showing you Exhibit 2188, Mr. Glover. Do you recognize that?

A. Well, that looks very familiar, yes sir.

Q. Tell us what you know about it. Is there any connection of the Iola Cement Traffic Association with it?

A. Well, I would just like to read what it says on this sheet, if you please.

Q. All right. Would that enable you to vouch for its correctness, in so doing?

A. Well, anything I did I would say was correct.

Q. Is that what you did?

A. I will have to read it first.

14480 (Pause.)

A. I remember this, yes sir.

Q. What date approximately, would you say that it was prepared?

A. Well, I just really couldn't tell you. I know it was in connection with a proposed general increase of rates on cement and perhaps rates on other articles, and our idea here was that if they advanced the rates on cement that it might result in trucking.

Q. Increased trucking?

A. Increased trucking.

Q. I note here that there is a reference in the legend on Exhibit 2188 to the year 1927, something that says "since 1927." Will that help you any in fixing the approximate date of the exhibit?

A. Well, not necessarily. Of course, the records of the Interstate Commerce Commission would show that.

Q. Can you state when this proceeding, ex parte 103, was instituted?

A. No, I couldn't tell you.

Q. Well, even approximately?

A. Well, I just wouldn't want to guess. I will say it was prior to 1930, but I can't tell. But, the records of the Interstate Commerce Commission would show that.

Q. Does the words "ex parte 103" refer to the

14481 number of the case before the I. C. C.?

A. That is correct. That is a proceeding instituted by the Interstate Commerce Commission.

Q. Was this map prepared in your office?

A. Yes sir.

Q. Is it your legend on the map in the lower left hand corner?

A. Well, I supervised it, suggested its preparation.

Q. What bearing did this statement that you make in the exhibit have on the situation, that these circles show the zones or hundred mile radius of the several cement shipping points within which it is now feasible to truck cement economically and at a delivered on job cost substantially lower than if shipped by railroad and trucked at destination from car to job or warehouse?

A. Well, making these zones was to show that practically all the destination territory, at least in the prin-

cipal population area, could be reached within the—we have here 100 mile zone.

14482 Q. Yes?

A. And, therefore, by advancing the rates, the rail rate, truck competition would be involved to practically all of the destinations from some mill. As you will notice, these circles overlap each other except in a very small area.

Q. Did your association take any position with regard to the truck competition?

A. Well, as I recall it, they had been established, shipped by rail, and they wanted to continue to ship by rail than to ship by truck; it would probably require changes in their shipping facilities.

Q. That is the way you understood it.

Did you hear anything among the mills concerning the effect of trucking upon prices at destination?

A. No, I don't remember anything of that kind.

Q. Can you state, Mr. Glover, from what point in the gas belt the 80-mile zone was figured from?

A. Well, I would say from each of the points that would be taken into account, you see.

Q. Do you mean that, say, take the Dewey mill in Oklahoma—

A. No, I mean to the nearest—from the nearest mill. For instance, we will assume that Fort Scott is 80 miles from Iola. It may be a hundred miles from Dewey. That would be the destination territory which was involved.

Q. It would be 80 miles from the nearest mill, then?

14483 A. That is probably right.

I want to say about this exhibit that I have referred to, in Ex Parte 103, that I don't recall that that had anything to do with the 80-mile investigation, but there was an investigation by the Interstate Commerce Commission on its own motion that dealt with the rates within the short distances from mills, and I believe that is 80 miles, if I remember correctly, and that is Docket 12910 or 12911, I. C. C. docket.

Q. About when did that happen?

A. Well, I cannot state specifically on that, but I would say that is prior to 1930.

Q. When you prepared this exhibit 2188, you were then

representing the mills comprising the Iola Cement Mill Traffic Association?

A. Whatever the then members happened to be; yes, sir.

Q. Do you know whether or not members of your association continued to use any forms or material after your separation from the association similar to what they used while you were there?

A. Why, I really don't know what happened after I severad my connection with them.

Q. What inquiry did you make, Mr. Glover, that permitted you to make the statement in Exhibit 2188, that map, that cement might be more economically
14484 trucked in those areas than delivered by railroad?

A. Well, we had available certain information on trucking of cement at that time. The information—

Q. What sort of information?

A. Well, the territory within which cement was being trucked at that time.

Q. Where did you get that?

A. Well, I don't know. I couldn't say now where we got it, but I assume it was based on either some Interstate Commerce decisions where they found traffic was being trucked within certain distances, or some of the mills may have given it to us.

Q. Do you think the latter is probable?

A. Well, I just couldn't recall right now which it might be.

Q. You don't recall?

A. I just know we had the information.

Q. You don't know where you got it from?

A. That is right, I don't know where we got it from.

Trial Examiner Norwood: You didn't make any survey yourself of that?

The Witness: Well, you know, this has been a long time ago, and I don't recall where we got it, but we had information on it.

By Mr. Wooden:

14485 Q. Do you recall whether you asked the mills for it?

A. I just recall we had such information, and I really don't remember where I got it, but I would say, of course, we were dealing in cases all the time before the Commis-

sion and before the railroads, that it could have been obtained from railroads as well as the cement mills or through some investigation of the Commission where they may have recognized competition within a certain distance.

Mr. Wooden: That is all, Mr. Glover.

Trial Examiner Norwood: Cross-examine him.

Mr. Leisure: No questions.

14486 MAURICE VERNON WARD was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Mr. Leisure: If your Honor pleases, before we start with this witness, I want to point out that we have been here all week, and this witness was subpoenaed after lunch time today to appear at 3 o'clock, and I don't consider that reasonable notice required either by the Commission or by the law.

Trial Examiner Norwood: Well, if the witness has appeared, why,—

Mr. Leisure: The only reason I mention it is that I hope it won't be continued. I don't think that is reasonable notice.

Mr. MacIntyre: If your Honor please, we call attention to the provision in the statute that a witness be given adequate notice, and if it has worked a hardship on this witness so as to prevent him from getting from his place of business to this court room within the time of service and now, of course, we would like to hear him say so.

Mr. Leisure: Mr. MacIntyre subpoenaed him since lunch time for 3 o'clock. I am simply stating to your Honor that I don't think that is reasonable notice.

14499 Mr. Wooden: Recall Mr. LeHaney for a few questions.

J. A. LEHANEY, recalled, having been previously duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

Q. Mr. LeHaney, when did you receive your subpoena to appear at this hearing?

A. Let's see. I believe it was Wednesday.

Q. Day before yesterday?

Mr. Leisure: I object to this as improper redi-
14500 rect. It has nothing to do with—

Mr. Wooden: (Interrupting.) It is not redirect.

Trial Examiner Norwood: He recalled him for this purpose.

Off the record.

(A discussion ensued off the record.)

By Mr. Wooden:

Q. Since you were subpoenaed day before yesterday, Mr. LeHaney, have you been in contact with Respondents' counsel regarding your testimony?

A. I have.

Mr. Wooden: That is all.

Trial Examiner Norwood: Any questions?

Mr. Leisure: Thank you. No questions.

14502 Washington, D. C.,
January 24, 1939.

14507 Mr. Wooden: I should like to offer at this time, Your Honor, papers which were produced by Respondents' Counsel from the files of the Penn-Dixie Company, and I believe, in part, from the files of the Illinois Central Railroad on request of the Penn-Dixie Company.

The numbers of the papers which I now offer are Commission's Exhibits 2135, 2136, 2138, 2139, 2140, 2143, 2144, 2147, and 2148-A and B.

There are other papers that were numbered along with these, but I made an effort to eliminate them and only offer the ones which appear to me to be necessary to give a picture of the situation involved.

The ones which I do not offer are Commission's Exhibits 2137, 2141, 2142, 2145, and 2146.

(Mr. Wooden hands exhibits to Respondents' Counsel.)

Mr. Wooden: Will you give this a number.

(Thereupon a paper was marked for identification as Commission's Exhibit No. 2627.)

Trial Examiner Norwood: Any objection?

Mr. Leisure: These are all copies, Your Honor. We make no objection as to identification.

We do object to the exhibits on the ground that it is correspondence between a Respondent and a railroad.

There is none of the material therein that proves
14508 or tends to prove any conspiracy of any kind. It is entirely outside the issues and the pleadings.

We therefore object to them as incompetent, irrelevant, and immaterial.

(Mr. Leisure hands exhibits to Mr. Zimmerman.)

Mr. Zimmerman: Thank you.

Mr. Wooden: Your Honor, these papers have to do with the subject of purchases by emergency relief agencies, such as WPA, the efforts of the WPA to have shipments made on Government bill-of-lading or substituting Government's bills-of-lading for commercial bills, and the efforts of Respondent, Penn-Dixie Company, to have the Illinois Central Railroad not accede to the requests of the WPA along that line.

Trial Examiner Norwood: I see. May I see them?

(Mr. Zimmerman hands papers to the Trial Examiner.)

(COM. EX. 2135 was offered and received in evidence.)

14509 (COM. EX. 2136 was offered and received in evidence.)

(COM. EX. 2138 was offered and received in evidence.)

(COM. EX. 2140 was offered and received in evidence.)

14510 (COM. EX. 2143 was offered and received in evidence.)

(COM. EX. 2144 was offered and received in evidence.)

(COM. EX. 2147 was offered and received in evidence.)

(COM. EX. 2148-A and 2148-B was offered and received in evidence.)

14511 Mr. Leisure: Mr. Wooden has selected certain exhibits from this file of exhibits which he says he is not offering. As to Exhibit 2145, for identification, being one of these exhibits, we ask that it be received at this time as being part of the same series of correspondence

and should be included in the offer, and if Mr. Wooden does not care to offer it, we would like to offer it ourselves at this time (handing Exhibit 2145 to Mr. Wooden).

Mr. Wooden: I would prefer to have you offer it, Mr. Leisure, but I will not object if you do.

Mr. Leisure: All right.

(COM. EX. 2145, RESP. EX. 98 were offered and
14512 received in evidence.)

14515 (COM. EX. 2627 was offered and received in evi-
14516 dence.)

14517 Mr. Wooden: I desire to offer at this time, Your Honor, two documents which were produced by Respondent Marquette Company and numbered, for identification, as Respondent's Exhibits 87 and 88. I am
14518 willing to have them re-numbered as Commission's Exhibits 2629 and 2630.

14520 (COM. EXS. 2629 and 2630 were offered and received in evidence.)

14521 Mr. Wooden: Your Honor, this morning at ten o'clock was the time set for a return of certain subpoenaes of duces tecum which were issued to the Secretaries of some 61 Respondent manufacturers. The documents that were to be produced at this time and place were specified in the subpoena as "duplicates of invoices covering all shipments of Standard Portland Cement made by your company to dealers at destinations specified in Schedule A hereof during the month of April, 1938, in which shipment resulted from sales made during that month."

14522 Respondents on whom these subpoenaes were served were given the option of producing and delivering the documents through Counsel, or by mail to Your Honor, or by personal appearance and production of the documents.

I should like to ask what the situation with reference to compliance with the subpoenaes at this time is.

14523 Mr. Leisure: The exhibits are here and we are prepared to go forward with the marking of those exhibits, in reply to the subpoena duces tecum; starting with the letter "A," the Aetna Company has produced certain invoices. I have the originals and the copies, and with Your Honor's permission I would like to have the copies marked, retaining the originals for the company,

and if Counsel wishes to check the copies against the originals we have them here so that he can do so.

Trial Examiner Norwood: Is that satisfactory?

Mr. MacIntyre: If Your Honor please, may we inquire of Mr. Leisure on this point: When production in accordance with this subpoena is made through Counsel or by registered mail the provision is included in the subpoena that the attestation be attached; that the documents are true and correct records of the company. Now, if that attestation can be attached to the copies that are submitted here in response to the subpoena I think that would help pave the way for an acceptance of the copies themselves.

Mr. Leisure: Well, I have the attestations. I can't properly attach them to the copies. They should be attached to the originals, but I see no reason why, with agreement with Counsel, we should not have an understanding that the copies be marked, Your Honor.

14524 Trial Examiner Norwood: If the Counsel agrees that they are correct, there is no occasion for any attestation.

Mr. Wooden: I see no reason why we can't use the copies rather than the originals.

Mr. Leisure: You can check them right here.

Mr. Wooden: I see no reason why we can't use the copies on the basis Mr. Leisure suggests.

Mr. Leisure: We are producing both originals and copies and we are merely asking that the copies be marked rather than the originals.

Trial Examiner Norwood: Yes. I think that is satisfactory.

Mr. Leisure: I will put the originals right here, Mr. Wooden, in this pile (laying papers on the table).

Mr. Wooden: The attestation, of course, does not attest to the accuracy of the copies, and the only way of checking that, I suppose, would be by checking.

Mr. Leisure: Yes, if you want to check them against the originals, they are here. I think you will find in all instances, as far as humanly possible with the check we have been able to make, they are exact copies.

14526 Mr. Heffernan: If Your Honor please, I should like to offer some exhibits in response to the subpoena. The Green Bag Cement Company of Pennsylvania produces 96 invoices together with an affidavit of cou-

pliance in response to the subpoena. The affidavit is by J. F. Woessner, assistant secretary.

Trial Examiner Norwood: Let them be marked as Commission's Exhibit 2631, for identification, A- to 4-R.

Mr. MacIntyre: If Your Honor please, it seems that since this exhibit is being submitted, or these 96 papers are being submitted in response to the subpoena duces tecum which was served upon the secretary of the Green Bag Cement Company of Pennsylvania for certain invoices, that we should follow with respect to this group of exhibits the procedure which has been suggested with respect to the other invoices expected to be submitted under subpoena here today by other Respondents in
14527 this case; that this group be given a number and that each of the invoices in the group be numbered as pages of a bound volume, and that the bound volume be treated as a physical exhibit so as to conserve as far as possible the expense that would be necessary and incident in this case should this cause go up on appeal.

Mr. Heffernan: I have no objection to that. I understand Counsel has offered to bind them. I will be glad for him to do that.

Mr. MacIntyre: With respect to this particular group we would be happy if it would be of any advantage—if it would be of any advantage to the Respondents' Counsel to aid them in the binding of them today and even aid the Reporter in the numbering of these 96 pages in this particular exhibit.

Trial Examiner Norwood: These 96 invoices will be marked for identification as Commission's Exhibit 2631, pages 1 to 96, inclusive, and they will be bound and treated as a physical exhibit with the Respondent Green Bag Company's right to have them photostated.

(The documents referred to were thereupon marked for identification "Commission's Exhibit 2631," being a series of 96 invoices of the Green Bag Cement Company of Pennsylvania.)

Mr. Smith: Your Honor, the Huron Portland
14528 Cement Company transmitted to the Examiner the original invoices called for by the subpoena accompanied by an affidavit of accuracy of compliance executed by the treasurer of the company in the absence and illness of the secretary. The Examiner has before him the invoices. I would request that they be given a number but

that I be given permission to substitute tomorrow a bound volume of copies of the invoices as to which we will also furnish, if desired, an affidavit of compliance.

Trial Examiner Norwood: Well, that refers to the package that I received by registered mail yesterday?

Mr. Smith: Yes.

Trial Examiner Norwood: Is that satisfactory?

Mr. Wooden: Yes, Your Honor, that is satisfactory.

Trial Examiner Norwood: Then I shall return this package unopened to Counsel for the Huron Company.

Mr. Smith: Will you now give it a number?

Trial Examiner Norwood: And they will be presented tomorrow in the same form as these others.

Mr. Wooden: He asked, however, that they be given a number. May that be done at this time?

Trial Examiner Norwood: I don't see how we can do that.

Mr. Smith: Well, perhaps that is not important. We will number the pages and then you can put the
14529 number on the outside.

Trial Examiner Norwood: Will Counsel take those and number the pages and present them as the other Respondents have undertaken to do?

Mr. Smith: Exactly, and should Mr. Wooden desire these for the purpose of checking, they will be held available for him.

Trial Examiner Norwood: All right.

Let the record show that the Huron papers were returned to Counsel for presentation tomorrow.

Mr. Smith: Mr. Examiner, on the record: For the Huron Portland Cement Company I present duplicate invoices of all invoices asked for in the subpoena together with the affidavit of Mr. Emory Ford, treasurer of the company.

I call them duplicate originals because they are carbon copies of the originals the originals of which are in the hands of the purchaser of the cement.

14530 Trial Examiner Norwood: Yes.

Mr. Smith: I withdraw my request to substitute copies. These constitute our compliance with the subpoena. Counsel can bind them or do what he wishes to them.

They were made by a dozen clerks and it would be im-

possible to make any attestation that any copies made were true copies and I therefore withdraw that request.

They can be given a number, if they want to do that, at this time.

Trial Examiner Norwood: Yes, these will be marked as documents that are presented by the Huron Portland Cement Company.

The affidavit of attestation is marked for identification "Commission's Exhibit 2632."

(The affidavit of attestation was thereupon marked for identification "Commission's Exhibit 2632.")

Mr. Wooden: I would like to suggest at this time that the originals of the invoices be marked for identification and then we may work out some arrangement by which the copies will be acceptable in lieu of the originals subject to such check as we may desire, but what is the objection to having the originals marked for identification?

14531 Mr. Leisure: I have no objection to that at all. If it were one letter or two letters I would have suggested it, but with these thousands of exhibits I thought we would save time this morning coming in and presenting the originals with the attestation saying we asked permission to substitute for the originals the copies that they might be marked for identification instead of the originals. If you want to mark the originals instead of the copies it is all right with me.

Mr. Wooden: I think that would be better.

Mr. Smith: In the bundle you will find typewritten sheets inserted as to certain of the States and many of the destinations which were listed in the subpoena duces tecum, no sales in the period called for have been made. We have inserted in the bundle such a statement as explanation of the absence of invoices for such destinations. Those can be withdrawn, if it is desired.

Mr. Wooden: I would suggest we go ahead on that basis, Your Honor, of numbering for identification the originals and then working out the substitution of copies later.

Trial Examiner Norwood: I think we should do that. We don't seem to be able to agree.

The exhibits under the supervision of the Trial
14532 Examiner, being invoices of the Huron Portland Cement Company, will be bound in separate volumes,

received as physical exhibits, and having the pages numbered. These books will be marked as Commission's Exhibits, for identification, 2633 to 2641, inclusive.

(The invoices of the Huron Portland Cement Company, being bound together in separate volumes, were marked "Commission's Exhibits 2633 to 2641," both inclusive, for identification.)

Trial Examiner Norwood: Now, these are in the custody of the Examiner until they are bound and marked. Go ahead with your presentation.

Mr. Leisure: I would like to have these marked for identification, please, being the Aetna exhibit, and here is the attestation clause that goes with it.

Mr. Wooden: I thought we had agreed to mark the originals.

Mr. Leisure: These are the originals.

Trial Examiner Norwood: The attestation clause is Exhibit No. 2642, and the invoices to be bound and the pages numbered—

Mr. Leisure: Well, no. We attempted to work out something to avoid all this, and if we can't work it out, we can only go ahead and mark them. I am now asking that they be marked.

14533 Trial Examiner Norwood: I am going to take them into my custody and have them bound here and neither side will have anything to do with them until they are bound and marked as I have directed.

Mr. Leisure: The difficulty with that, Your Honor, is that we have tried that on the other exhibits which were submitted heretofore at the beginning of this trial, and we have not yet been able to straighten out those exhibits. If we lose control of these exhibits before they are numbered we are not able to check them back with our copies, and before we lose control of them we ask that they be marked so that we may not have the confusion that we have had heretofore. As I have already said, we haven't been able to straighten out our exhibits yet as a result of producing them in that fashion previously.

Trial Examiner Norwood: Well, Counsel may retain these until tomorrow and check them and number them in any way he likes. If that is your desire, you can withdraw those two, but when they are marked, they are received by me. Counsel can take them and prepare them and make the corresponding numbers as between his copies and the

originals and bring them here tomorrow, and they can be taken in in a very short time.

14534 Trial Examiner Norwood: As I understand it, Counsel withdraws 2642 and 2643. Just let the record show that they are withdrawn and will be presented tomorrow together with the other documents required by the subpoena not already marked and retained by the Examiner.

14539 EVERETT MacINTYRE was thereupon recalled for the Commission, and, having been previously sworn, testified further as follows:

14540 *Direct Examination by Mr. Wooden.*

Q. Mr. MacIntyre, I am showing you papers that have been marked, for identification, as Commission's Exhibits 408-A to W, inclusive, and other papers that have been marked, for identification, as Commission's Exhibits 409-A to T, inclusive.

I believe you gave some identification of the papers in general on a previous appearance of yours on the stand, but will you state just what the papers designated as I have designated them are?

A. My identification of these papers which have been referred to by Mr. Wooden is covered by my statement as appearing in my former testimony in this case of February 2, 1938, on pages 2743 through page 2752, inclusive, of the transcript.

I would like to add to that by further clarification in supplementation the following statement: That the prices are quotations appearing in the tabulations for cement in cloth sacks and are subject only to a 10 cents per barrel cash discount for payment within 15 days. That was the designation that appeared with the filing in the offices of The Cement Institute.

There are further markings that appear on these that I consider probably should call for further explana-
14541 tions, and I will attempt to make those explanations at this time:

On 408-A appears the word "Georgia" in the list of companies. That is the company whose name starts with Georgia as appearing in the list of Respondents. The

word "Nat'l," abbreviation for "National" is the National Cement Company of Alabama. "P-Dixie" is for Penn-Dixie Cement Corporation. "LS. Ala.," Lone Star of Alabama; "Alpha," A-l-p-h-a, for Alpha Portland Cement Company; "U. A." for Universal-Atlas Cement Company; "Lehigh" for "Lehigh Portland Cement Company"; "Sig. Mt." for Signal Mountain Portland Cement Company; "Sou. States" for Southern States Cement Company; "Cumberland" for Cumberland Portland Cement Company; "Hermitage" for Hermitage Portland Cement Company; "Kosmos" for Kosmos Portland Cement Company; "Louisville" for Louisville Portland Cement Company; and "Volunteer" for Volunteer Portland Cement.

On 408-B, there appears the word "National" for National Cement Company; "Georgia" for the Georgia Cement Company again; "P-Dixie" for Pennsylvania-Dixie Cement Corporation; "Florida" for Florida Portland Cement Company; "Alpha" for Alpha Portland Cement Company; "LS. Ala." as an abbreviation for Lone Star of Alabama, meaning Lone Star Cement Corporation, Alabama Division; Volunteer Portland Cement Company designated by the word "Volunteer"; "U. A." representing the Universal-Atlas Cement Company; "Lehigh" 14542 for Lehigh Portland Cement Company; "Sou State" for Southern States Cement Company; "Vulcanite" for Vulcanite Cement Company; and "Stan. L. & S." for Standard Lime & Stone Company.

Q. Did you use the same abbreviations elsewhere in those?

A. Throughout for those particular companies.

Q. Yes.

A. On some of these we have, I notice on 408-C, the word "Missouri" appearing in the list of companies that are for the Missouri Portland Cement Company.

On 408-D, I notice the names of some new companies I haven't heretofore mentioned: "Ash Grove" for Ash Grove Lime & Cement Company; "Trinity" for Trinity Portland Cement Company; "L. S. Texas" for Lone Star of Texas; "Arkansas" for Arkansas Portland Cement Company; "Monarch" for Monarch Portland Cement Company; "Marquette" for Marquette Cement Manufacturing Company; "Consolidated" for Consolidated Ce-

ment Corporation; "Dewey" for Dewey Portland Cement Company.

I also note on 408-D particularly under the name of the company of the Pennsylvania-Dixie Cement Corporation appearing under the word "Penn-Dixie" opposite the names of certain towns two places. For example, opposite the name "Mansfield," being Mansfield, La., we find the price as filed by all the other companies as $2.74. Under Penn-Dixie opposite that is $2.76, and, later, $2.74.

14543. The explanation to that is made in this light, that the cards as examined, the file cards as examined in the Cement Institute showed that all of the companies for Mansfield, La., in that instance had filed $2.74 in the first instance, except Penn-Dixie, who filed $2.76. Penn-Dixie immediately thereafter filed $2.74, placing its price the same as the others.

The same thing occurred as to some of the other cities, so wherever the two prices appear opposite a name of a town and under the name of a company, that is, in that manner, it can be explained in like manner; that is, the first price is the first one filed by the company, and then the second price filed by that same company. That appears on 408-D under the name of several companies for Covington, La., and for Penn-Dixie for several towns in that State.

In the list of names of companies appearing on 408-F attention is called to "L. S. V-a." as abbreviations for Lone Star of Virginia; "L-e-h-i" for Lehigh Portland Cement Company; "Giant" for Giant Portland Cement Company; "Medusa" for Medusa Portland Cement Company; "Whitehall" for Whitehall Cement Manufacturing Company; "S-t-a-n L. & S." for Standard Lime & Stone; "No. Am.," abbreviations for North American Cement Corporation.

On 408 H there is an abbreviation "S.W.P.C." for Southwestern Cement Company, among the list of companies.

14544. On 408 I the word "Yosemite" appears for Yosemite Portland Cement Company—Yosemite Portland Cement Corporation; "Santa Cruz" for Santa Cruz Portland Cement Company; "Pacific" for Pacific Portland Cement Company; "Cowell" for Cowell Lime & Cement Company; "Calaveras" for Calaveras Portland Cement Company; "Monolith" for Monolith Portland Ce-

ment Company; "Beaver" for Beaver Portland Cement Company; "C-a-l-i-f" for California Portland Cement Company; "Riverside" for Riverside Cement Company; "S. W. L-o-s-A" for Southwestern Portland Cement Company, Los Angeles, Calif.; "S.W.P." for Southwestern Portland Cement Company, El Paso.

I would also like to call attention to the list of the prices appearing opposite the names of all of the towns or practically all of the towns under the State name "California." You will find that there are as many as three prices opposite many of these towns. The explanation to that is that all of these companies except those noted by prices directly below their names filed those prices immediately opposite the name and in the order in which they appear.

For example, at Oroville, O-r-o-v-i-l-l-e, California, there were prices of $3, $2.60, and $3. That is explained by price filing in the first instance by these companies of $3 which was later changed by all of them to $2.60 and then later changed back by all, to $3.

Mr. Wooden: Off the record.

14545 Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: Go ahead.

A. (Continuing) On 408-K the word "Spokane" in the list of companies, for Spokane Portland Cement Company; "Monolith" for Monolith Portland Cement Company; "Superior P.C.I" for Superior Portland Cement, Inc.; "No. W. P." for Northwestern Portland Cement Company.

On 408-M, "Mono. M. W." for Monolith Portland Mid-West Company and "L. S. Kans." is Lone Star of Kansas.

On 408-N, "P. C. of Utah," Portland Cement Company of Utah, and the word "3 Forks," the numeral "3" and "Forks" is for Three Forks Portland Cement Company.

408-P, "L. S. Tex" is Lone Star of Texas.

408-S, in the names of companies, is "N. W. States"; that is Northwestern States Portland Cement Company; "S. W. Osborn," Southwestern Portland Cement Company, Osborn, Ohio; "Petoskey" for Petoskey Portland Cement Company; "Wabash" for Wabash Portland Cement Company; "Mo. P. C.," abbreviation for Missouri Portland Cement Company.

408-T, in the list of companies, there is "Pitts. P. G.," abbreviations for Pittsburgh Plate Glass Company; and "G. Bag" for Green Bag Cement Company of Pennsyl-

vania; "Standard P. C." for Standard Portland Cement Company; "L. S. Ind." for Lone Star of Indiana.

14546 On 408-U are "G. B. W. Va.," standard for Green Bag Company of West Virginia.

On 408-V, in the list of companies, is an abbreviated term "Naz." for Nazareth Cement Company.

On 408-W, in the list of companies, appears the word "Superior," that is for Superior Cement Corporation; "Diamond for Diamond Portland Cement Company; "G. B. Pa." for Green Bag Cement Company, Pennsylvania; "G. B. W. Va." for Green Bag Cement Company of West Virginia; "Keystone" for Keystone Portland Cement Company.

On 409-A in the list of companies appears the abbreviated word "Manitow," the abbreviation for Manitowoc Portland Cement Company.

On 409-C in the list of names of companies appears the name "Okla" as an abbreviation for Oklahoma Portland Cement Company; "Mono. W.," which are abbreviations in that case for Monolith Portland Mid-West Company.

On 409-G appears in the list of companies the words "Ash G. Neb." for the Ash Grove, affiliate of the State of Nebraska; that is, affiliated company of the Ash Grove Lime & Cement Company which operates in the State of Nebraska.

On 409-H there appears in the list of companies or concerns selling cement, as elsewhere, here, "S. D. P. L. T." for South Dakota Cement Plant.

14547 On 409-L there appears the abbreviations "L. S. N. Y." for Lone Star of New York; "Naz." for Nazareth Cement Company; "P. D." for Penn-Dixie; "Vul" for Vulcanite; "Edi" for Edison; "Nat'l. P. C." for National Portland Cement Company.

Similar abbreviations for those particular companies appear elsewhere on other of these tabulations, such as 409-M.

Mr. Wooden: Your Honor, I am not sure but it is my impression that I at one time offered these papers, Commission's Exhibits 408 and 409, but whether or not I did I will at least offer them at this time; Commission's Exhibits 408-A to 408-W, inclusive, and 409-A to 409-T, inclusive.

14548 Q. Mr. MacIntyre, I am showing you a paper marked as Commission's Exhibit 2644, for identification; will you tell us what you know about that paper?

A. This is a list of basing points and basing-point prices furnished to me by Mr. D. S. Colburn, vice-president of the Marquette Cement Manufacturing Company, on June 22, 1934.

Mr. Zimmerman: Do you suppose we might look at it before he tells anything more about the contents of it?

Mr. Wooden: He hasn't told us anything about the contents.

Mr. Zimmerman: Yes, he has. He has characterized the whole thing.

May I look at it?

Mr. Wooden: Just a moment.

Mr. Zimmerman: I move the answer be stricken out. I don't think it is proper to put into the record directly or indirectly contents of a document which has not been offered in evidence and which has not been exhibited to Counsel for the other side.

14549 Trial Examiner Norwood: Read the question and answer.

(Question and answer read.)

Mr. Zimmerman: I think my motion is too broad. I think a portion of the answer should be stricken out, that portion which described the document. I have no objection to his saying that the document was given "to me by D. S. Colburn, vice-president of the Marquette Cement Manufacturing Company" on such and such a date.

Trial Examiner Norwood: The motion will be allowed as to the term "basing-point prices."

Mr. Zimmerman: Yes.

Mr. Wooden: All right.

Trial Examiner Norwood: Strike the word "of" also, "of basing-point prices."

Mr. Zimmerman: He said "of basing points and basing-point prices"; those two.

Trial Examiner Norwood: Yes, all of that will be excluded.

Mr. Zimmerman: Yes, thank you.

By Mr. Wooden:

Q. Do I understand, Mr. MacIntyre, the paper marked Exhibit 2644 was given you by Mr. Colburn on the date you specified?

A. It was.

Q. There is some handwriting at the bottom of 14550 the paper in pencil. Whose is that?

A. That is my handwriting.

Q. When was it put on there?

A. At the time Mr. Colburn gave me this paper, in 1934.

Mr. Wooden: I will offer the paper in evidence. I don't care about offering the handwriting of Mr. MacIntyre, that which he has identified as his. I just merely wanted to explain it.

Mr. Zimmerman: If the Examiner please, we object to the admission of the document marked, for identification, Commission's Exhibit 2644, on the ground that there has been no proper foundation laid for its admission in evidence; that there is no showing that it is relevant, material, or competent so far as any issue in the case is concerned.

Trial Examiner Norwood: Any further objection?

Mr. Leisure: I have nothing to add.

Mr. Zimmerman: There is a further objection to the handwriting on the document.

Mr. Wooden: I am excluding that from the offer.

Mr. Zimmerman: I didn't quite hear you, Mr. Wooden.

Mr. Wooden: I excluded that from the offer.

Mr. Zimmerman: Oh thank you. I didn't quite understand that.

14551 Trial Examiner Norwood: This was furnished to you by Mr. Colburn?

The Witness: By Mr. D. S. Colburn, vice-president of the Marquette Cement Manufacturing Company.

Trial Examiner Norwood: Did he state what it was? Did he state what it was when he gave it to you?

The Witness: He did.

Trial Examiner Norwood: What did he say it was?

The Witness: He stated that that was a list of the basing points and basing-point prices that they had used in calculating the delivered prices that they had filed with the Code Authority, The Cement Institute, a few months previously.

(COM. EX. 2644 was offered and received in evidence.)

14552 By Mr. Wooden:

Q. Mr. MacIntyre, what do you know about the paper that I hand you marked as Commission's Exhibits 2645-A to D, inclusive?

14553 A. These papers were sent to me by Mr. F. L. Stone, vice-president and general manager of the Universal-Atlas Cement Company, on June 25, 1934.

By Mr. Wooden:

Q. Is 2645-A an original letter received by you from Mr. Stone?

A. It is, and 2645-B, C, and D were the enclosures attached to the letter as received from him.

Mr. Wooden: I will offer these papers, 2645-A to D, inclusive.

Examination on Voir Dire by Mr. Leisure.

Q. Is the handwriting on Exhibit 2645-A your handwriting, Mr. MacIntyre?

A. Which handwriting are you speaking about?

Q. (Indicating.)

A. Oh, you are speaking about the numerals appearing in the left margin?

Q. Yes.

A. No, that is a file number, 1-7272-3, that was placed in the margin, in that left margin, by the Docket Section of the Federal Trade Commission after I turned it in to the Docket.

14557 (COM. EXS. 2645-A, 2645-B, 2645-C, and 2645-D was offered and received in evidence.)

By Mr. Wooden:

Q. Mr. MacIntyre, I am showing you papers marked, for identification, as Commission's Exhibits 2646, 2647-A and B, 2648-A, B, and C, 2649, 2650, 2651, 2652-A and B, 2653-A to D, inclusive, 2654, 2655, 2656, and 2657.

Will you state where those papers came from and what you know about their existence?

A. These are photostats of documents which I selected from the files of the Universal-Atlas Cement Com-

14558 pany in their offices at 208 South LaSalle Street, Chicago, Ill., and which were furnished to me by Mr. F. L. Stone and Mr. Greenly on March 2, 1932.

They came from files that contain correspondence between offices—that is, the Chicago office of the Universal-Atlas Cement Company and its sales offices in Pittsburgh and its sales office or district office in the Chicago area.

By Mr. Wooden:

Q. Did you state when you obtained them?

A. March 2, 1932. Mr. Stone described the correspondence as being correspondence with his sales offices in Chicago and in Pittsburgh.

Q. Do I understand that the photographs themselves were provided you by Mr. Stone?

A. They were.

Mr. Wooden: I will offer these papers.

14561 Mr. Conaghan: Your Honor, I would like to object to each and every one of the documents numbered from 2646 to 2657, on the ground that each and every one is irrelevant and incompetent and immaterial as regards the issues presented by the complaint.

The letters are dated in the years 1929, 1930, 1931. They relate to facts then existing in the States of Michigan, Pennsylvania, Ohio, Indiana, and Illinois with reference to trucking generally. Now, the conditions which existed in

1929 and 1930 and 1931 regarding trucking have been 14562 changed by the laws of the States that I have just mentioned, and, therefore, the letters are in no manner relevant to the facts presented by the complainant at this time.

I further wish to point out that each photostat has been marked with blue ink or green ink or red ink, and that that is misleading and may give the wrong impression to the Commission that those marks were placed upon there by the company from which they were obtained, but it is quite clear upon inspection, I think, that many of those marks of underscoring of sentences and of paragraphs were placed upon the photostats after they were obtained from the company.

Mr. Wooden: I think that is apparent, and were so apparent, why, I did not intend, of course, the offer to include any such marks.

Mr. Conaghan: I don't think they should be admissible for that reason. They have been mutilated and changed since they have left the possession of the company.

Mr. Wooden: I would be very glad to have those physically erased, such marks. As to the change in the conditions by the law, there was also a change in conditions by acts of the industry.

The exhibit that I referred to a while ago to which Mr. Leisure objected, the circular of the Pittsburgh

14563 Builders' Supply Club, is referred to in Exhibit 2655 by Mr. Stone, who attaches the copy and sends it to his Pittsburgh manager and suggests a line of action to be taken.

Trial Examiner Norwood: Now, are there any further objections?

Mr. Leisure: I submit, Your Honor, that a reading of Mr. Stone's letter, of 2655—if Your Honor will read it, I am sure that you will agree that if the letter, 2656, by the Building Supply Dealer is not admissible standing alone, the letter of Mr. Stone's will not make it admissible.

Mr. Wooden: I didn't agree that it was not admissible standing alone. I said I would not have offered it.

Mr. Leisure: I think it is clear that a building supply dealer writing some letter stating his opinions about trucking should not be received in evidence as binding against Respondents in this case.

Trial Examiner Norwood: But isn't there some evidence that these building supply dealers took these matters up with the manufacturers and discussed them in meetings?

Mr. Leisure: No evidence that the author of this letter did, as far as I know.

14564 Trial Examiner Norwood: Well, I shall retain those two for further examination.

Now, are there any further objections?

With regard to the marks on these exhibits, I see nothing that emphasizes the paragraphs. In other words, there is a line drawn down the margin of the entire letter. That is Exhibit 2647-A, and 2649. There was an emphasis marking there, so that Counsel may either put a uniform mark on all of that or erase it or furnish new photostats.

Mr. Wooden: Your Honor, no point is made of any such marks, and I said I would be very glad—

Trial Examiner Norwood: They did make a point about it.

Mr. Conaghan: I object to Counsel putting any marks of his own on those photostats. I think that is misleading, too.

Trial Examiner Norwood: Well, it does not appear who made the marks. It might have been the Attorney-Examiner who wishes to attract attention to some particular paragraph as being the one containing relevant matter.

Mr. Conaghan: Yes, Your Honor, but the point is—

Trial Examiner Norwood: I don't see how it could prejudice—

14565 Mr. Conaghan: I am objecting to them because they have been marked by someone after they were taken from the company. I think it is misleading. Certain words are underscored, certain phrases are underscored.

Trial Examiner Norwood: I have eliminated those.

Mr. Conaghan: I don't see how they can be eliminated.

Trial Examiner Norwood: I simply eliminated them by not passing on them at this time. I handed them back to Counsel for the Commission.

Mr. Conaghan: Having objected to certain underscoring and certain marks being placed upon the photostats as they now exist, I object to Counsel putting any additional marks and underscoring on them. Misleading.

Mr. Wooden: So long as it is clear—

Trial Examiner Norwood: If the Counsel places similar marginal marks down there opposite the other paragraphs attached to the one that is emphasized, that will remove any possible grounds of objection, because then no paragraph is distinguished above another.

Mr. Conaghan: I don't agree with Your Honor. I object to it. I think it is entirely misleading to take a photostat from the files of a company and then underscore certain paragraphs and certain words and certain margins. It is mutilating.

14566 (COM. EXS. 2646, 2648-A, 2648-B, 2648-C, 2650, 2651, 2652-A, 2652-B, 2653-A, 2653-C, 2653-B, 2653-D, 2654, and 2657, were offered and received in evidence.)

By Mr. Wooden:

Q. Mr. MacIntyre, I am showing you papers 14567 now marked for identification as Commission's Exhibits 2658, 2659-A and 2659-B, 2660-A to 2660-D, inclusive; 2661-A to 2661-D, inclusive; 2662-A, 2662-B, and 2662-C. Will you tell us what you know about the papers so numbered as to accounting for their physical existence?

A. The document marked as Commission's Exhibit, for identification, 2658, is a photostat of a document that I selected from the files of the Diamond Portland Cement Company and given to me by Mr. Raff who was in charge of the office there at that time, as a memo he had sent to his salesmen.

The document marked for identification as Commis-

sion's Exhibit 2659-A and 2659-B, is a photostat of a document that I selected from Mr. Raff's files and which was explained to me as a memorandum which had been prepared by Mr. H. D. Raff of the Diamond Portland Cement Company and sent to his competitors.

The document marked for identification as Commission's Exhibit 2660-A to 2660-D, inclusive, is a photostat of a document selected from the files of the Diamond Portland Cement Company and which was handed to me by Mr. Raff and explained as a document in the form of a memorandum prepared by Mr. H. D. Raff commenting on a memorandum by Mr. W. A. Davis, vice-president of the Standard Portland Cement Company concerning the trucking of cement and my recollection is that Mr.
14568 Raff told me that that document was sent to Mr. Davis and other competitors.

The document marked for identification as Commission's Exhibit 2661-A to 2661-D, inclusive, is a photostat of a document that I selected from the files of the Diamond Portland Cement Company and which was given to me by Mr. Raff and explained to me by him as a document he had received from Mr. W. A. Davis, vice-president of the Standard Portland Cement Company, concerning the trucking of cement.

The document marked for identification as Commission's Exhibit 2662-A, 2662-B, and 2662-C is a photostat of a document selected from the files of the Diamond Portland Cement Company by me, and which was given to me then by Mr. Raff and explained to me by him as being a memorandum which had been prepared by Mr. R. D. Raff of the Diamond Portland Cement Company and distributed to their competitors concerning the trucking of cement.

All those documents were furnished to me by Mr. Raff of the Diamond Company on March 23, 1932.

Q. I understand the photographs themselves were provided you by Mr. Raff?

A. No, he furnished me the original documents and I had them photostated and returned the documents to him that he had furnished me, after comparing them with the photostats.

Mr. Wooden: I offer these papers in evidence as
14569 identified by Mr. MacIntyre (handing documents to Mr. Leisure).

Mr. Leisure: May I ask Mr. MacIntyre a question about

this first exhibit, this Commission's Exhibit 2658, for identification?

Trial Examiner Norwood: Certainly.

Examination on Voir Dire by Mr. Leisure.

Q. As I understand you to say, Mr. MacIntyre, this was distributed to other manufacturers or was that some following document?

A. No, the document marked for identification as Commission's Exhibit 2658 was handed to me by Mr. Raff as a copy of a memorandum he had sent to his salesmen; an inter-office communication of the Diamond Portland Cement Company.

14570 Mr. Leisure: And there is writing up in the right-hand corner; is that your writing?

The Witness: Yes, that was put on there at the time of my interview with Mr. Raff; that is R. D. Raff, and he told me Mr. H. D. Raff had prepared that and sent it to his competitors, so I made a note on the document itself at that time.

Trial Examiner Norwood: Which was that one?

Mr. Leisure: Commission's Exhibit 2659-A and 2659-B.

As to 2659-A and 2659-B, we object to it as being incomplete. The witness has said that he interviewed a Mr. Raff who told him that another Mr. Raff had done certain things, which is plainly hearsay evidence, and we object to the exhibit on that ground.

Furthermore, on the ground that there is no showing as to what competitors he may have sent it to. They may have been non-respondents in this case, and I submit that the document is irrelevant, incompetent, and immaterial.

Mr. Wooden: It wouldn't matter if they were non-respondents. There is the form of cooperative ac-

14571 tivity on the part of the Respondent Diamond Company, with competitors, and, of course, we know the general situation in the trade at that time. It has been shown on that ground.

Mr. Leisure: We then ask it be confined to the Diamond Company alone, if it is received, on that ground, there being no showing as to whether or not it was sent to a Respondent.

14572 Trial Examiner Norwood: What did you say about this 2660-A to D (handing the exhibits referred to to the witness)?

The Witness: My statements on that were that Mr. Raff, R. D. Raff, when he handed me the documents, and I asked him what it was, told me that it was a memorandum which had been prepared by another officer of his company, Mr. H. D. Raff, commenting on a memorandum which they had received from W. A. Davis, vice-president of the Standard Portland Cement Company, and that the Raffs, as officers of the Diamond Portland Cement Company, had then distributed the document, of which this is a photostat, to the Standard Portland Cement Company, and their other competitors in the Ohio district—that is, the other cement manufacturers in their district.

Mr. Wooden: I believe the Standard has been shown to be a Respondent in the case.

14573 Mr. Leisure: We make the same objection to the next one; that is, the one marked 2661-A to D, which is apparently the Davis memorandum which Mr. MacIntyre has just described.

Trial Examiner Norwood: You mean that is the memorandum to which this is a reply?

Mr. Leisure: Well, I don't know. I am just referring to the witness' testimony, and he said that he had another.

Trial Examiner Norwood: Let's ask him if that is. Is that the original memorandum?

The Witness: I would like—

Trial Examiner Norwood: To which 2668-C is a reply?

The Witness: Mr. R. D. Raff told me that the document marked, for identification, as Commission's Exhibits 2660-A to D, inclusive; that is, being a photostat of the original document; is a memorandum commenting upon—that is, a memorandum by H. D. Raff of the Diamond, an officer of the Diamond Portland Cement Company, commenting upon a memorandum which had been prepared, and which they had received from W. A. Davis, vice-president of the Standard Portland Cement Company, and which is now in photostatic form, marked, for identification, as Commission's Exhibits 2661-A to D, inclusive.

14574 By Mr. Wooden:

Q. Mr. MacIntyre; who was the R. D. Raff that you referred to?

14575 A. He was an officer of the Diamond Portland Cement Company at Middle Branch, Ohio.

14576 Washington, D. C.,
January 25, 1939.

14578 (COM. EXS. 2658, 2659-A, 2659-B, 2660-A, 2660-B, 2660-C, 2660-D, 2661-A, 2661-B, 2661-C, 2661-D, 2662-A, 2662-B, 2662-C were offered and received in evidence.)

14579 (COM. EX. 2246 was offered and received in evidence.)

(COM. EX. 2247 was offered and received in evidence.)

(COM. EX. 2249 was offered and received in evidence.)

14580 (COM. EX. 2251-A and 2251-B was offered and received in evidence.)

(COM. EX. 2255 was offered and received in evidence.)

(COM. EX. 2256-A and 2256-B was offered and received in evidence.)

14581 (COM. EX. 2257 was offered and received in evidence.)

(COM. EX. 2436 was offered and received in evidence.)

(COM. EX. 2367 was offered and received in evidence.)

(COM. EX. 2368 was offered and received in evi-

14582 dence.)

(COM. EX. 2370-A and 2370-B was offered and received in evidence.)

(COM. EX. 2372 was offered and received in evidence.)

(COM. EX. 2373 was offered and received in evi-

14583 dence.)

(COM. EX. 2374 was offered and received in evidence.)

(COM. EX. 2375 was offered and received in evidence.)

(COM. EX. 2376 was offered and received in evidence.)

Mr. Wooden: Your Honor, with reference to the marks on exhibits numbered for identification 2649, 2647-A and B, 2655 and 2656, all the underlying marks in pencil have been erased, the marginal marks that were on these

14584 papers in ink could not and cannot be erased, but in the only case where other portions of the same document were not so marked similar marks have been put in the margins.

Trial Examiner Norwood: Yes.

Mr. Wooden: So that no one part of a document stands out any more than any other by reason of any marking

(handing exhibits to Trial Examiner), and I trust that satisfies the instructions that Your Honor gave yesterday.

Trial Examiner Norwood: Well, I do not say that any pencil underlining here would have any prejudicial effects on anyone, but they might as well be removed to satisfy the objections of Counsel on the other side; however, this one here (indicating), as I stated, cannot be removed, this phrase that is encircled here, the pencil has been marked out, but it has turned white.

Mr. Wooden: That is the way it was when the document was photographed, that is all that means. The witness can testify to that fact, Your Honor.

Trial Examiner Norwood: Well—

Mr. Wooden: In other words, that is a part of the document as it was photographed and turned over to him.

Trial Examiner Norwood: Is that part of the document as it was received?

The Witness: The document, for identification, 14585 2649, shows a phrase "trucking from our Hannibal plant," enclosed in a white line. That white line appeared on the original document when it was selected from the files of the Universal-Atlas Cement Company. It was on the original and came out on this photograph that was furnished to me by Mr. F. L. Stone of the Universal-Atlas Cement Company. I never had the original on which the mark appears.

(COM. EX. 2649 was offered and received in evidence.)

(COM. EX. 2647-A and 2647-B was offered and received in evidence.)

(COM. EX. 2655 was offered and received in evi-14586 dence.)

(COM. EX. 2656 was offered and received in evidence.)

EVERETT MacINTYRE was thereupon recalled as a witness for the Commission, and, having been previously sworn, testified further as follows:

14587 *Cross Examination by Mr. Zimmerman.*

Q. With reference to the Commission's Exhibit 2644, which is the document that you produced yesterday and said you received from Mr. Colburn of the Marquette, I

wonder, Mr. MacIntyre, if you will recall the time and place of any conversation you had with Mr. Colburn, and will you please tell us your best recollection of that time and place.

A. Yes; it occurred, as I recall it, during June, 1934, in the offices of the Marquette Cement Manufacturing Company, in Chicago.

14588 Q. Did you ask him if Marquette had any such thing as a mill base or a base at its mill for its destination prices?

14589 A. I believe I did.

Q. Did you ask him for any information as to what that was at any time?

A. I think I did.

Q. Any conversation as to how it was arrived at?

A. I don't recall the conversation in exact terms as to how he stated that it was arrived at. I do recall this much about it: During the conversation I had asked him about all of the filings that he had made with Cement Institute pursuant to the Code, and he had related how they had filed at so many thousands of destinations, and I asked him how they arrived at the prices which were filed for those destinations.

Q. Go right ahead.

A. And he stated that they had taken the base prices that were known to be in effect at LaSalle, which was at or near the location of one of his mills, and a number of other basing points and had used those in calculating the delivered prices that they had filed for the many destinations with The Cement Institute, and said that was about the only way they could do it within the short period that they were given in which to file the prices with The Cement Institute.

Q. Did he not tell you that Marquette had broadcast quotations meeting destination prices that were established by competing mills?

A. No, I don't recall that statement.

14590 Q. And did he not explain to you that in order to determine what destination prices Marquette would have to broadcast in order to meet these destination prices, that they ascertained, as far as they were able to, through inquiry by their salesmen in the territory, and inquiry through dealers and other persons to whom prices were broadcast by competitors; what the destination prices

were that had been thus broadcast by competitors, and then deducted the freight which was determined from freight tariffs put out by the railroads; that is, the freight from the shipping point of the competing mills to the several destinations, and thus ascertain what base or what figure was used by their competitors as far as they could in determining their delivered prices? Did he explain that to you in any way?

A. No. With respect to his filings with The Cement Institute he told me just the opposite; that is, that he had used basing-point prices in calculating the delivered prices by adding to those basing-point prices the freight rates as a factor. He did, however, along the line of your inquiry, make this observation, that the basing-point prices had become known to him and to others in the industry, in the method of picking up a quotation here and there at a few destinations and then checking and confirming the basing-point price upon which that was built and using—

Q. By what method would they check it and de-
14591 termine it as he explained it to you?

A. That they would use the freight rate from the destination where these one or two quotations had been picked up, back to the applicable basing point, and then using the basing point that they had confirmed in that manner as being the applicable basing point in calculating the delivered prices for the other basing points,—I mean, the other destinations for which quotations were filed would apply—

14599 Q. Right. Let us go back to the conversation with Mr. Colburn, if you please.

Are you quite certain that Mr. Colburn did not say to you, when he handed you this Commission's Exhibit 2644, that this was a memorandum of the mill nets, or mill base, making up with the freight the delivered prices that were broadcast by Marquette from time to time, showing the dates when they had broadcast the quotations to meet destination prices established by their competitors?

A. No, I do not recall such statement as that with Mr.
Colburn. His statement in connection with that list
14600 was that it was used by him in the filing of the prices with The Cement Institute, and that he used it for that purpose in establishing these quotations at the various—many thousand destinations, in order to escape the necessity of having to issue new quotations for all of those

many thousands of destinations at that particular time. That was the thing that he was seeking, according to his statement, to avoid.

Q. Now, Mr. MacIntyre, I do not know whether this is on the record or not, but if not I should like to have it there. You were at that time acting as an attorney-investigator for the Federal Trade Commission?

A. Yes.

14601 Q. Well, now, in what capacity have you exam-
14602 ined witnesses here, if that is not so?

A. I have examined the witnesses here with a view of eliciting from them all the pertinent facts possible to elicit, and not with any view of attempting to sustain any particular charge in any complaint that has been made by the Federal Trade Commission, or anyone else.

14608 EVERETT MacINTYRE was thereupon recalled as a witness for the Commission, and, having been previously sworn, testified further as follows:

Direct Examination by Mr. Wooden.

Q. Mr. MacIntyre, referring to Commission's Exhibits 408-A to 408-W, inclusive, and 409-A to 409-T, inclusive, was there any date or time fixed to which those compilations were applicable, as you made them? If so, what was it?

A. The month of December, 1933, as I recall, and Mr. Reiter told me that it was understood by all members of the industry that these filings were to be in within five days from the date of the approval of the Code; that is, the effective date of the Code.

Q. Approval by whom?

14609 A. Well, I probably shouldn't have used the word "approval"; from the effective date of the Code. I don't recall, now, the exact date of the effective date of the Code, but I believe it was the 7th of December; five days would make it the 12th; that I believe Mr. Reiter told me it would be necessary for the filings to be in his office; 12th of December, 1933.

While some of these filings were not made on or before that particular date in December, they were accepted by

him a few days later in a number of instances as of the fifth day after the effective date of the Code, and all of the original filings, as represented by these tabulations, were considered by Mr. Reiter and the other officials of the Institute who were serving as the Code Authority as being filed five days after the effective date of the Code in December, 1933.

Mr. Wooden: That is all.

14611 Mr. Leisure: If Your Honor pleases, with regard to these invoices, we have attempted to follow out the suggestion made by Mr. MacIntyre yesterday as to binding these, and the numbering of these thousands of exhibits. We have done the best we can since yesterday noon to number them all, and to number them in duplicate; that is, to number the copies, which meant that we have had to match the copy against each original to be sure that the numbers followed consecutively, and we are presenting the originals, as I suggested yesterday, with the hope that Your Honor, having marked the originals,

14612 will allow us to submit copies in their stead, because these originals are often needed by the companies for income tax purposes, and otherwise, and I think it is customary practice to do that just as we have allowed the Commission to do consistently here with reference to photostatic copies which they have offered.

In presenting these invoices to Your Honor, I want to call attention to language in the subpoena, in the descriptive part, which describes and designates a transaction as an executed sale. Now, of course, whether any transaction is an executed sale or an executory sale, or anything of that character, is legal phraseology which the Respondents themselves as layman are not capable of passing upon. Therefore, I want to make clear to Your Honor that in presenting these invoices we are not waiving any of our rights, privileges, or prerogatives in the premises.

Trial Examiner Norwood: As to what is an executed sale?

Mr. Leisure: That is a matter of law to be determined by the courts, and we, in other words—if the draftsman of this subpoena had seen fit to use conclusions of law in his subpoena, we want to make clear to Your Honor now that we do not feel that we are bound by those con-

14613 clusions of law and we want to be perfectly free to show any facts or any matters of law which should

be shown with respect to those invoices. We are submitting them now with that statement to Your Honor, that they represent shipments or transactions. Whether they are executory or executed sales, or whatever the proper legal term might be, the laymen are not attempting to pass on that, and we are not agreeing to be bound by any estoppel in law or fact, or otherwise, in the premises in presenting these invoices.

Mr. Wooden: Might I inquire of Mr. Leisure whether in complying with the terms of the subpoena to which you have just referred Respondent has interpreted the language "sales made during that month" to mean orders accepted during that month?

Mr. Leisure: I did not hear the last part of your statement, Mr. Wooden.

Mr. Wooden: Whether that has been interpreted, in complying with the subpoena, to mean orders accepted during that month?

Mr. Leisure: Each Respondent has interpreted it according to his own method as he has brought it in.

It is my understanding that they have attempted to cover shipments and transactions during that period without attempting to pass on the words "executed sale" or "executory sale."

14614 Mr. Smith: Let me add there in presenting the Huron invoices we submitted all invoices issued during that period.

Trial Examiner Norwood: Yes.

Mr. Smith: That does not mean the order was accepted during that time. The order may have been placed six months before. All invoices and what other marks—

Mr. Wooden: You furnished more than called for, then?

Mr. Smith: Not necessarily; that was our interpretation.

Mr. Wooden: "And for—" was deliberately added there, so as not to go back beyond the month of April as to the acceptance of any orders.

Mr. Smith: Many of the shipments made by Huron were on contract. It would have been quite impossible in the period to check every shipment, practically impossible, to determine whether or not it was on an order then received or against a prior contract.

Mr. Leisure: I would like to say further that in presenting these we are not conceding that by the production

of the invoices that it is admitted that they are or that they contain matter which is material or relevant to any issue in the case whatever.

14615 Mr. MacIntyre: If Your Honor please, since Mr. Leisure has raised the question as to whether or not the word "sales" as used in these subpoenas duces tecum applies to executed sales as during the month of April, 1938, and especially in the light of the statement made by Mr. Smith to the effect that he had submitted invoices covering not only orders received during the month of April but invoices covering shipments which had been entered into under contract as much as six months before, there is only one way of clearing any confusion that may arise as a result of the date on which that order was placed with the cement company and that would be to ask the Respondents to submit a list of the dates on which each of the contracts were entered into as listed on the face of the invoices. In other words, these invoices carry the numbers of specific job contracts. If they are specific job contracts which were entered into previous to the month of April, 1938, in that event, in order that we may know the facts, we can only ask that the Respondents submit to us a list of the dates on which those specific job contracts were entered into showing for each date the number of the contract of the specific job contract so that it may be compared with the invoice, because it was not contemplated that such invoices would be submitted under this

14616 subpoena duces tecum, but since they have been submitted we ask that the dates of those invoices be submitted—the dates of the specific job contracts be submitted, I should say.

Mr. Wooden: That language "and for shipments resulting from sales made during that month," as used in the subpoena, was inserted for the particular purpose of avoiding the submission of invoices covering shipments made on contracts taken prior to the month of April.

Trial Examiner Norwood: Does that same condition exist with respect to the ones you are now about to offer?

Mr. Leisure: The ones we are now about to offer are the invoices covering the period which is designated in the subpoena, and in addition to what I have said we do not concede that any invoice is complete evidence of the consideration or price of any sale. It is our contention that a sale is made up of many elements other than a quoted

price. It is the service that goes into the sale as well as the money price.

Trial Examiner Norwood: But does the invoice show whether or not it was shipped on a closed contract or on an open order?

Mr. MacIntyre: If Your Honor please, the in-
14617 voices as we know them do show if they are shipped under specific job contracts entered into, show the numbers of those contracts. Now, in order that all the facts in that respect may be known we ask that the Respondents furnish us with the dates of those specific job contracts so that we may know the dates on which they were entered into so as to distinguish them from open market sales.

Mr. Leisure: Shall I proceed with these offers?

Trial Examiner Norwood: Yes.

Mr. Leisure as Counsel for each of a number of the petitioners, Cement Manufacturers, and in response to a subpoena duces tecum, produced from its files a group of duplicates of invoices it had rendered. He also submitted for each such petitioner a sworn-to certification that the invoices thus produced were true and correct duplicates of authentic records. In each instance the invoices were marked for identification as a Commission Exhibit and the sworn-to certification also marked for identification as a Commission Exhibit. The names of those on whose behalf Mr. Leisure thus produced the invoices, the number he produced in each instance in each group, the Commission Exhibit number with which each group was marked, and the Commission Exhibit number with which the applicable sworn-to certification was marked are shown by the record to be as follows:

Aetna Portland Cement Company.
group of 205 invoices—Com. Ex. 2663
14618 : sworn to certification—Com. Ex. 2664

Arkansas Portland Cement Company
group of 19 invoices—Com. Ex. 2665
14619 sworn to certification—Com. Ex. 2666

Ash Grove Lime & Portland Cement Company
group of 38 invoices—Com. Ex. 2667
sworn to certification—Com. Ex. 2668

Bessemer Limestone & Cement Company.
14620 group of 66 invoices—Com. Ex. 2669
sworn to certification—Com. Ex. 2670

Colorado Portland Cement Company
group of 31 invoices—Com. Ex. 2671
14621 sworn to certification—Com. Ex. 2672

Conlay Cement Manufacturing Company
group of 40 invoices—Com. Ex. 2673
sworn to certification—Com. Ex. 2674

Cumberland Portland Cement Company
group of 9 invoices—Com. Ex. 2675
14622 sworn to certification—Com. Ex. 2676

Dewey Portland Cement Company
group of 79 invoices—Com. Ex. 2677
sworn to certification—Com. Ex. 2678

Diamond Portland Cement Company
14623 group of 27 invoices—Com. Ex. 2679
sworn to certification—Com. Ex. 2680

Edison Cement Corporation
group of 20 invoices—Com. Ex. 2681
sworn to certification—Com. Ex. 2682

14624 Federal Portland Cement Company, Inc.
group of 64 invoices—Com. Ex. 2683
sworn to certification—Com. Ex. 2684

Glen Falls Portland Cement Company
group of 38 invoices—Com. Ex. 2685
14625 sworn to certification—Com. Ex. 2686

Green Bag Cement Company of West Virginia
group of 19 invoices—Com. Ex. 2687
sworn to certification—Com. Ex. 2688

Hawkeye Portland Cement Company
14626 group of 10 invoices—Com. Ex. 2689
sworn to certification—Com. Ex. 2690

Hercules Cement Corporation
group of 47 invoices—Com. Ex. 2691
14627 sworn to certification—Com. Ex. 2692

Hermitage Portland Cement Company
group of 82 invoices—Com. Ex. 2693
sworn to certification—Com. Ex. 2694

Idaho Portland Cement Company
group of 90 invoices—Com. Ex. 2695
14628 sworn to certification—Com. Ex. 2696

Lone Star Cement Corporation
group of 100 invoices—Com. Ex. 2697
14629 group of 100 invoices—Com. Ex. 2698
group of 55 invoices—Com. Ex. 2699
sworn to certification—Com. Ex. 2700

Pittsburgh Plate Glass Company
group of 23 invoices—Com. Ex. 2701
14630 sworn to certification—Com. Ex. 2702

Portland Cement Company of Utah
group of 18 invoices—Com. Ex. 2703
sworn to certification—Com. Ex. 2704

Southern States Portland Cement Company
14631 group of 32 invoices—Com. Ex. 2705
sworn to certification—Com. Ex. 2706

14657 Alpha Portland Cement Company
group of 100 invoices—Com. Ex. 2710
group of 113 invoices—Com. Ex. 2711
14658 sworn to certification—Com. Ex. 2712

Nebraska Cement Company
14659 group of 34 invoices—Com. Ex. 2713
sworn to certification—Com. Ex. 2714

Nazareth Cement Company
group of 34 invoices—Com. Ex. 2715
14660 sworn to certification—Com. Ex. 2716

North American Cement Corporation
group of 106 invoices—Com. Ex. 2717
14661 sworn to certification—Com. Ex. 2719
letter accompanying invoices—Com. Ex. 2718

National Cement Company
group of 42 invoices—Com. Ex. 2720
sworn to certification—Com. Ex. 2721

14662 Monolith Portland Mid-West Company
group of 63 invoices—Com. Ex. 2722
sworn to certification—Com. Ex. 2723

Monarch Cement Company
group of 42 invoices—Com. Ex. 2724
sworn to certification—Com. Ex. 2725

14663 Missouri Portland Cement Company
group of 102 invoices—Com. Ex. 2726
sworn to certification—Com. Ex. 2727

Medusa Portland Cement Company
group of 259 invoices—Com. Ex. 2728
14664 sworn to certification—Com. Ex. 2729

Keystone Portland Cement Company
group of 37 invoices—Com. Ex. 2730
sworn to certification—Com. Ex. 2731

Georgia Cement & Products Company
group of 14 invoices—Com. Ex. 2732
14665 sworn to certification—Com. Ex. 2733

Northwestern States Portland Cement Company
group of 44 invoices—Com. Ex. 2734
sworn to certification—Com. Ex. 2735

14666 Oklahoma Portland Cement Company
group of 28 invoices—Com. Ex. 2736
sworn to certification—Com. Ex. 2737

Peerless Cement Corporation
group of 277 invoices—Com. Ex. 2738
14667 sworn to certification—Com. Ex. 2739

Petoskey Portland Cement Company
group of 135 invoices—Com. Ex. 2740
sworn to certification—Com. Ex. 2741

Southwestern Portland Cement Company
group of 81 invoices—Com. Ex. 2742
14668 sworn to certification—Com. Ex. 2743

Standard Portland Cement Company
group of 58 invoices—Com. Ex. 2744
sworn to certification—Com. Ex. 2745

14669 Superior Cement Corporation
group of 26 invoices—Com. Ex. 2746
sworn to certification—Com. Ex. 2747

14670 Three Forks Portland Cement Company
group of 31 invoices—Com. Ex. 2748
sworn to certification—Com. Ex. 2749

Union Portland Cement Company
group of 89 invoices—Com. Ex. 2750
14671 sworn to certification—Com. Ex. 2751

Volunteer Portland Cement Company
group of 56 invoices—Com. Ex. 2752
sworn to certification—Com. Ex. 2753

14672 West Penn Cement Company
group of 34 invoices—Com. Ex. 2754
sworn to certification—Com. Ex. 2755

14673 Whitehall Cement Manufacturing Company
group of 21 invoices—Com. Ex. 2756
sworn to certification—Com. Ex. 2757

14674 Wabash Portland Cement Company
group of 31 invoices—Com. Ex. 2758
sworn to certification—Com. Ex. 2759

14703 Lehigh Portland Cement Company
(1) group of 100 invoices—Com. Ex. 2778
14704 (2) group of 101-200 invoices—Com. Ex. 2779
(3) group of 201-300 invoices—Com. Ex. 2780
(4) group of 301-400 invoices—Com. Ex. 2781
(5) group of 401-493 invoices—Com. Ex. 2782
14705 sworn to certification—Com. Ex. 2783

Consolidated Cement Company
group of 184 invoices—Com. Ex. 2784
sworn to certification—Com. Ex. 2785

Florida Portland Cement Company
14706 group of 50 invoices—Com. Ex. 2786
sworn to certification—Com. Ex. 2787

Giant Portland Cement Company
group of 26 invoices—Com. Ex. 2788
14707 sworn to certification—Com. Ex. 2789

Kosmos Portland Cement Company
group of 57 invoices—Com. Ex. 2790
14708 sworn to certification—Com. Ex. 2791

Lawrence Portland Cement Company
group of 36 invoices—Com. Ex. 2792
sworn to certification—Com. Ex. 2793

Pennsylvania Dixie Cement Corporation
group of 149 invoices—Com. Ex. 2794
14709 sworn to certification—Com. Ex. 2795

Signal Mt. Portland Cement Company
group of 26 invoices—Com. Ex. 2796
sworn to certification—Com. Ex. 2797

14710 Trinity Portland Cement Company
group of 184 invoices—Com. Ex. 2798
sworn to certification—Com. Ex. 2799

Vulcanite Portland Cement Company
14711 group of 25 invoices—Com. Ex. 2800
sworn to certification—Com. Ex. 2801

Wolverine Portland Cement Company
group of 113 invoices—Com. Ex. 2802
14712 sworn to certification—Com. Ex. 2803
Castrelia Portland Cement Company
group of invoices—Com. Ex. 2804 A & B

14632 Mr. Conaghan, on behalf of Universal Atlas Cement Company, produced the following papers in response to the subpoena duces tecum:

The bound volume of invoices of the Universal Atlas Cement Company consisting of 517 pages was marked "Commission's Exhibit 2707" for identification.

14633 The attestation of the Universal Atlas Cement Company was marked "Commission's Exhibit 2708" for identification.

Mr. MacIntyre: Mr. Conaghan, with respect to this group of invoices which you have just presented and which have been numbered Commission's Exhibit 2707, having 517 pages, may I inquire whether or not specific job contract numbers appearing on those invoices will include any specific job contracts under which the Universal Atlas committed itself to make shipments bearing dates previous to April, 1938, or do you know?

Mr. Conaghan: The invoices are in response to the subpoena duces tecum. If the contract was made prior to the month of April, then such invoices are not included in the group I have just handed the Examiner.

Mr. MacIntyre: In other words, any of these invoices bearing specific job contract numbers do not carry such numbers if contracts committing the Universal Atlas to make shipments were dated previous to April 1, 1938, is that right? Is that what I understand from your statement?

Mr. Conaghan: I don't know what you mean by specific number.

Mr. MacIntyre: Those invoices that are in this group Commission's Exhibit 2707 which carry specific job
14634 contract numbers.

Mr. Conaghan: I don't know what you mean by that "specific job contract numbers."

Mr. MacIntyre: Well, carrying contract numbers—I will put it that way because some of them are specific job contracts—can you state whether or not that specific job contracts thus indicated by numbers on these invoices were dated previous to April 1, 1938?

Mr. Conaghan: No, I can't answer that question. I don't know.

Mr. Wooden: Let me ask one.

Mr. Conaghan: I am not on the witness stand, Mr. Wooden.

Mr. Wooden: I understand. You may answer off the record, if you want to.

Would you interpret the subpoena as calling for the production of invoices covering shipments made during the month of April only and also covering shipments made during that month on orders accepted during that month?

Mr. Conaghan: Yes; orders accepted and sales made during that month.

Mr. Wooden: Orders entered?

Mr. Conaghan: Yes.

14655 (COM. EXS. 408-A to 408-X, and 409-A to 409-U, both inclusive, were offered and received in evidence.)

14674 Trial Examiner Norwood: Let the record show that the invoices produced by the Huron Portland Cement Company have been returned to the Counsel for further inspection. He can look them over and pick out those that should be taken out, under our understanding this morning, and then present them again.

14675 EVERETTE MacINTYRE thereupon resumed the stand and testified further as follows:

Direct Examination by Mr. Wooden.

The witness identified Com. Ex. 2709 A to 2709 G, inclusive, as photostats of documents that he selected from the files of Medusa Portland Cement Company,

14676 Cleveland, Ohio, during June 1933. After selections from their files were made by the witness the papers were furnished by Mr. J. B. John and other officials of the company. He may add, with respect to the paper he has just described, that they were furnished to him by Mr. J. B. John as having been selected from his files during an investigation he was making of his files in connection with some bids that "his" company had submitted to the states of Indiana and Illinois in 1932 and 1933. Those were explained to the witness to be reports by salesmen of "his" company operating in that territory in which

they had submitted bids; Com. Ex. 2760 as photostat of a paper that was selected from the Medusa files by the witness on the occasion of that visit during June, 1933,
14677 that is, his visit to their offices, and was also described as the other document that he has just testified about; Com. Ex. 2761 A, B and C as photostats of papers which were selected by the witness from the files of the Medusa Portland Cement Company and furnished to him by Mr. J. B. John and other officials of that company under the same circumstances, as reports of their salesman relating to those Indiana-Illinois bids of 1932 and 1933; Com. Ex. 2762 A to 2762 E as photostats of papers he selected from the Medusa files during his visit to their office, in Cleveland, in June, 1933, and furnished to him by officials of that company as reports from their salesmen relative to bids that Medusa and its competitors had made to the states of Indiana and Illinois during 1932 and
14678 1933; Com. Ex. 2763 A and B as two papers constituting a tabulation of basing points and basing point prices which were furnished to him by Mr. John of the Medusa Company as a showing of the basing points and basing point prices used by the Medusa Portland Cement Company in its calculations of the prices bid on the state of Illinois during the 1932-1933 bids; Com. Ex. 2764 A, B and C as tabulations furnished to him by Mr. John of the Medusa Company during June 1933 showing the basing points and basing point price used by the Medusa Company in its calculation of the delivered prices that it bid
14679 in the state of Indiana during 1932 and 1933; Com. Exs. 2765, 2766, and 2767, as photostats of papers furnished to him by Mr. J. B. John after his selection of the originals from the files of the Medusa Portland Cement Company, during January 1932; Com. Ex. 2768 and 2769 as photostats of documents which were selected by him from the files of the Diamond Portland Cement Company, March 23, 1932, and furnished to him by Mr. Raff of the Diamond Company on that date, and were explained by Mr. Raff to him as relating to that trucking problem of his and his competitors that the witness testified to this morning; that he discussed with the witness at the time these selections were made from his files.

14679 Mr. Wooden: I will offer at this time, Your, Honor, Exhibits, for identification, 2709-A to G, 2760,

14680 2761-A, B, and C, 2762-A to E, inclusive, and 2763-A and B, 2764-A, B, C, 2765, 2766, 2767, 2768, and 2769.

Trial Examiner Norwood: Any objection?

(Counsel study exhibits proffered.)

Trial Examiner Norwood: We will take a five minutes' recess.

(There was a short recess taken.)

Trial Examiner Norwood: Are you ready to proceed?

Mr. Leisure: With respect to the exhibits that have just been offered we have grouped them in separate groups. The first group which I wish to take up and object to is Commission's Exhibits 2709-A to G, for identification, and I would like to consider at the same time and have Your Honor look at them, Commission's Exhibits 2760 and 2761-A, B, and C, for identification. These are apparently reports made by a salesman of the Medusa Company, made on his way home from bids, to his own company, and from reading the documents they do not appear to have any material which is binding or could be binding on any other company save his own company.

Mr. Wooden: They are not confined to bids of his own company; they are bids of competitors, as well.

Trial Examiner Norwood: Reporting these bids after the bids had been opened?

Mr. Leisure: Yes, sir.

14681 Trial Examiner Norwood: And he was present?

Mr. Leisure: Yes, sir.

Trial Examiner Norwood: That would be evidence as to what the bids were. Is that what they are offered for, to show the prices?

Mr. Wooden: Not so much for that—we have other evidence for that—but in the course of his comments the salesman makes certain comments whether prices were regular or not, and so forth.

Mr. Leisure: The bids are in evidence and what the opinion of a salesman might be as to whether they were regular would not be material and such statements would not be admissible in evidence if he were on the witness stand.

The same objection is made to Exhibit 2762-A to 2762-E, it being a similar report made by a salesman to his own company under similar circumstances.

May I ask Mr. MacIntyre a question about these tabulations, Commission's Exhibits 2764-A and 2763?

Trial Examiner Norwood: Certainly.

Examination on Voir Dire by Mr. Leisure.

Q. Mr. MacIntyre, as I understand it, you received these exhibits from the Medusa Company. Did you find them already made up when you were examining the
14682 file or were they made up at your request?

A. They were in the Medusa files at the time I examined the files.

Q. They were already in there?

A. One of them is a mimeographed form, as you will notice, except the fill-ins.

Q. They were in the files when you found them?

A. That is true.

It was explained to me at that time that they had been used, they or copies of them had been used in the determination of the delivered prices that had been bid to the States of Illinois and Indiana.

Q. That is, they were explained to you in that way after you found them and took them and asked Mr. John, did you say under direct, about them?

A. Mr. John, Mr. Dawson, and I believe Mr. Pierson were also in on the interview on that. I believe Mr. A. C. McCormack, the sales manager—

Q. You didn't ask them all.

A. No. I am trying to tell you now which one of these men at the Medusa office made the statement about those particular papers. It is my recollection that that was Mr. A. C. McCormack.

Q. I understood you to say—

A. A. C. M-c-C-o-r-m-a-c-k.

14683 Q. I understood you to say on your direct examination, Mr. MacIntyre, that you talked to Mr. John about them.

A. Yes.

Q. Am I mistaken in that?

A. Yes, he was the one that finally turned the papers over as the chief executive of the Medusa Portland Cement Company.

Mr. McCormack explained some of the papers to me, and those fell in the group that he explained.

I may explain, Mr. Leisure, that at the time of this particular interview information concerning the policies of the company was furnished to me by Mr. J. B. John, the chief executive of the committee.

Matters concerning any costs or shipments or volume of shipments were furnished to me by Mr. Dawson who served, I believe, as secretary-treasurer of the company.

Matters concerning figuring of prices and of like character were furnished to me or explained to me by Mr. A. C. McCormack, the sales manager of the Medusa.

Q. When you found these in the files, did you consider them matters of policy or did you consider them under one of the other groups that you just gave us?

A. They were in the file that I asked Mr. John to permit me to examine concerning the bids that had been submitted to the States of Indiana and Illinois. When that file was handed to me for examination, these papers
14684 were in the file, and Mr. McCormack, of course, discussed with me the manner in which they had arrived at these prices that they bid in those States.

Mr. Leisure: As to 2765 and 2766, we object to them as being incompetent, irrelevant, and immaterial, no proper foundation having been laid for their receipt in evidence.

We make the same objection to 2763-A and B, and 2764-A and B, and ask that if they be received, they be received as against the company in whose files they were found. They are not binding on any other company.

As to 2767, we make the same objection as made to the previous exhibits 2766 and 2765; that is, it is incompetent, irrelevant, and immaterial, and no proper foundation has been laid for its introduction in evidence.

Trial Examiner Norwood: Does it appear who this Mr. G. C. Wohl, general traffic manager, is, the address on 2766?

Mr. Wooden: I don't know that I can answer the question. I would like to ask the witness if he—

Trial Examiner Norwood: Yes.

Mr. Wooden: —knows.

Mr. Leisure: As to 2768, we make no objection to that letter. It is on the original letterhead of the com-
14685 pany and apparently was written by the author who is purported to have written it.

Trial Examiner Norwood: Any further objections to the offer?

Mr. Zimmerman: No.

Mr. Leisure: There is one more.

Trial Examiner Norwood: Yes.

Mr. Leisure: There is one more here, Your Honor, 2769, the letter from the district manager to his dealers.

Trial Examiner Norwood: Yes.

Mr. Leisure: We submit that it should not be received as against any other company, his correspondence with his dealers, not being material or relevant or binding upon any of the Respondents in the case.

(COM. EX. 2709-A, 2709-B, 2709-C, 2709-D, 2709-E, 2709-F, and 2709-G, was offered and received in evidence.)

(COM. EXS. 2760, 2761-A, 2761-B, 2761-C were
14686 offered and received in evidence.)

Trial Examiner Norwood: 2768 is not objected to. That is received in evidence.

(COM. EX. 2768 was offered and received in evidence.)

(COM. EXS. 2763-A, 2763-B, 2764-A, 2764-B, 2764-C, 2767, and 2769 were offered and received in evidence.)

14688 (COM. EXS. 2765 and 2766 were offered and received in evidence.)

14693 By Mr. Wooden:

Q. Mr. MacIntyre, state whether or not you had any conversations with Mr. John on the subject of trucking.

A. I did.

Q. What was it?

A. I asked him what his policy of his company was in that respect and he replied that it was one of discouragement toward trucking.

Q. Did you question him as to why discourage it?

A. I did.

Q. What did he say?

A. He stated that it led to a demoralization of the markets, price structures, and for that reason it created unhealthy conditions in the sale of cement. He didn't feel it was worth the trouble to bother with it.

Q. Mr. MacIntyre, I show you papers marked for identification as Commission's Exhibits 2770 to 2776, inclusive. Will you tell us what you know about the origin of those papers?

A. 2770, 2771, and 2772 are photostats of papers
14694 which were selected by me from the files of the Lehigh Portland Cement Company, Allentown, Pa., during September, 1931, which were furnished to me by Mr. Joseph S. Young and John Bowen of that company. They were taken from the inter-office files of that company; that is, the files that contained the correspondence between sales representatives of that company and its Allentown office.

Q. And what are the others that I asked you about?

A. 2773 is one of the announcements of the Lehigh Portland Cement Company to its dealers that it used during 1932, dated July 28, 1932, announcing the then discontinuance of loading of trucks for delivery; that is, loading of trucks, their cement, at their Lehigh mills.

I made a note on the announcement at the time I got it at the Lehigh offices on July 2, 1933, of the date on which that became effective.

I believe Mr. John Bowen of the Lehigh Company explained to me the date on which it became effective as August 2, 1932, and that date appears in my handwriting at the bottom of the sheet.

The document that is marked for identification as Commission's Exhibits 2774, 2775, and 2776 were also secured by me from the Lehigh Portland Cement Company, July 2, 1933, furnished to me by Mr. Young and Mr. Bowen after the same had been selected from the files of the Lehigh.

14695 Q. Do I understand, then, Mr. MacIntyre, the first three numbers I asked you about were obtained in 1931 and the remainder in 1933; is that right?

A. That is correct.

Q. Obtained from the same office? From the same individual?

A. The Allentown, Pa., office of the Lehigh Portland Cement Company.

Mr. Wooden: I offer those papers in evidence.

Give these the next numbers.

(The documents referred to were thereupon marked for identification as Commission's Exhibits 2777-A, 2777-B, and 2777-C.)

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Wooden:

Q. Mr. MacIntyre, I am showing you papers marked for identification as Exhibits 2777-A, B, and C. What do you know as to the origin of those papers?

A. These are tabulations of basing points and basing-point prices which were furnished to me by Mr. C. S. Crawford, assistant to Mr. J. C. Bowen, sales manager of the Lehigh Portland Cement Company at Allentown, Pa.; were furnished to me on June 28, 1934.

I may further explain that when I was in Chicago
14696 a few days previous to June 28, 1934, I had requested Mr. B. H. Rader, vice-president and general sales manager of the Lehigh Portland Cement Company, to furnish me with information, such information as he could which had been used as a basis by the Lehigh Portland Cement Company in its determination of the prices that it filed with The Cement Institute under the Code. Mr. Rader told me that he couldn't furnish it to me personally, that I would have to obtain it from the Allentown office. He explained to me how they arrived at those prices, and he told me that when I reached the Allentown office, they would be informed by him that he wished that they would furnish me with the information; and Mr. Young and Mr. Bowen, Mr. Joseph Young, Mr. John C. Bowen, and Mr. C. S. Crawford were called in during an interview of mine in Mr. Young's office, and Mr. Young told Mr. Bowen to have the information turned over to me.

Mr. Bowen then asked Mr. Crawford to turn the information over to me.

Q. And is this the information that was turned over to you?

A. These three.

Q. Under those circumstances?

A. These three papers are the information that were turned over to me.

Q. Now, there is some pencil handwriting on 2777-A and B. Whose is that?

14697 A. The handwriting appearing at the top of 2777-A, in the words "Lehigh Mills" is in my handwriting. That was put on there after Mr. Bowen and Mr. Crawford explained to me that the list on that sheet are lists of basing points and basing-point prices at locations of the Lehigh Mills.

The handwriting appearing at the bottom, in the words "prepared and submitted by J. S. Crawford, assistant to J. C. Bowen of the Lehigh Portland Cement Company, received 6-28-34, E. Mac." are in my handwriting as an identifying note.

Q. You say the heading was put on after it was explained to you. How long after?

A. It was put on there at the time in the offices of the Lehigh Portland Cement Company at the time it was explained to me by Mr. Bowen and Mr. Crawford.

Q. When was the handwriting of yours at the bottom put on?

A. That was put on there at that time, at the time they furnished them to me; the handwriting appearing at the top of 2777-B, in the words "prices are net, $1.40 for cloth sacks," "s-a-x," "effective date," was placed on there by me at the time they were furnished to me on the basis of information furnished to me by Mr. Bowen and Mr. Crawford of the Lehigh Company.

I don't believe there is any handwriting other than the Reporter's on 2777-C.

14698 Q. When you say "A" is a list of Lehigh points, what are "B" and "C"?

A. Mr. Bowen and Mr. Crawford explained to me that the lists of basing points and basing-point prices appearing on 2777-B, and 2777-C, are locations other than those of the Lehigh Portland Cement Company mills.

Mr. Wooden: All right. I will offer 2777-A, B, and C.

Trial Examiner Norwood: Counsel may retain those for study over night.

14699 Washington, D. C.,
January 26, 1939.

14701 Regarding the motion of Counsel for Respondents beginning on page 14649 of the record, the motion is allowed, so far as striking that part of the witness' testimony beginning on page 14647, line 14, with the words "and he stated," and including the remainder of the matter in that paragraph eliminating trucking. That is, we are allowing testimony as to the fact of this meeting and what he did pursuant thereto but not allowing the narrative of past events as reported to this man.

I think that this official of the company, Mr.—what is the name?

Mr. Wooden: Raff.

Trial Examiner Norwood: —Raff would have been permitted to have testified to that part if he had been on the stand.

Also, the objection on page 14650 of the record,
14702 beginning on line 16, should have been sustained.

In the confusion I made a misappraisal of the facts on which the ruling is based, and it is nobody else's fault because the statements are very plain. I simply made an error, and I shall sustain the objection.

I shall also sustain the objection beginning on line 3 of that same page, 14650, and strike the answers beginning on line 10 of that page, including lines 10, 11, and 12, and the answer on page 14651 beginning on line 5 and including line 11 of that page.

Off the record.

(There was a discussion off the record.)

Mr. Wooden: Your Honor, I assume we have our exceptions to your ruling just announced.

Trial Examiner Norwood: Oh, yes.

Mr. Wooden: And it is our position that the statements of a Respondent conveying reports made to him, oral reports made to him by his own employees regarding competitive conditions and on which such Respondent relied and acted is no more inadmissible hearsay than if the Mr. Goldenbogen in question had written a report and that report had been produced from Respondent's files and offered here in evidence.

Trial Examiner Norwood: I think you will have to get Mr. Goldenbogen here to tell what happened at that
14703 meeting.

Mr. Wooden: I am just stating our position.

14713 Mr. Wooden: Just a moment.

Do I understand now, Mr. Leisure, that all the companies represented by you have produced the invoices or duplicates of the invoices as called for by this subpoena?

Mr. Leisure: Well, Mr. Wooden, no list was furnished to us by the Commission as to the number of Respondents that you saw fit to subpoena, but to the best of our knowledge and belief this covers all of the Respondents who were served with subpoenas.

Mr. Wooden: At any rate, you have produced and
14714 submitted all that were submitted to you; is that correct?

Mr. Leisure: That is correct.

Mr. Wooden: In view of the statement made yesterday by Mr. Leisure regarding the interpretation of the language of the subpoena, as to involving the point as to whether the subpoena called for or excluded invoices resulting or covering shipments resulting from sales made prior to April, 1938, it will apparently be necessary to call for a statement from each company submitting invoices as to which of those invoices, if any, cover shipments resulting from sales made prior to April.

I endeavored to make that language of the subpoena as plain as it could be to avoid the very thing which apparently some companies have disregarded, and I don't know how it could be made any plainer than to say that we wanted only invoices covering shipments during April and which shipments resulted from sales made during April.

Mr. Leisure: I understand the subpoena has been so interpreted. I don't know of any exception.

Do you know of any exception to that, Mr. Wooden?

14718 Mr. Zimmerman: If the Examiner please, as has been previously explained to Mr. Wooden, under date of December 12, 1938, there was received at the office of the Marquette Cement Manufacturing Company at Chicago, Ill., a letter addressed to the secretary of the Marquette Cement Manufacturing Company and signed Otis P. Johnson, Secretary, a copy of which may go into the record if Counsel desires it, or not; it doesn't matter; but we have brought along a copy of the letter which I will deliver to the Reporter here, now.

(A document was handed to the Reporter.)

Mr. Zimmerman: There was enclosed with this letter a subpoena duces tecum addressed to the secretary of the Marquette Manufacturing Company, a copy of which is also brought with the letter and is presented to the Examiner and to the Reporter here now.

There was attached to the subpoena a schedule of destinations for the direction of Marquette Cement Manufacturing Company, a copy of which is also produced
14719 and attached to the letter from Mr. Johnson and the copy of the subpoena.

Without in any wise admitting the validity of the said subpoena or that a proper foundation was laid therefor or that any part or all of the documents therein specified contain any information which is relevant, material, or pertinent to any issue in the said cause, B. J. Handley, secretary of the Respondent, the Marquette Cement Manufacturing Company, did, at 10 o'clock a. m., Eastern Standard Time, on the 24th of January, 1939, appear before the Hon. John W. Norwood, Examiner in charge of taking testimony and evidence in the above-entitled cause and he did there remain during that entire day ready to testify at the instance of the Federal Trade Commission in the said matter, but as to the production of duplicates of invoices as set forth in the subpoena duces tecum the witness did not produce or bring with him any such documents for the reason that the Marquette Cement Manufacturing Company in the due course of business did not prepare or cause to be prepared any such duplicate invoices and therefore had and does not have any such documents in its possession.

However, we do now offer to produce and exhibit to the Examiner a tabulation prepared under the direction of
B. J. Handley, the secretary of the Marquette Ce-
14720 ment Manufacturing Company which he has examined and which is certified as being true and correct, which tabulation shows the following information taken from and based upon all of the Respondent Company's records kept by it in lieu of any duplicate invoices referred to and described in the aforesaid subpoena duces tecum, the tabulation being in form as follows:

I do not know whether you would like to have me read that on the record or present it to you in writing.

Mr. Wooden: I think you might as well go ahead on the record.

Mr. Zimmerman: Thank you.

The tabulation in the first or lefthand column under the title "Destination" appears the name of the destination, being all of the destinations referred to in the schedule of destinations attached to the said subpoena duces tecum to which any sales of Standard Portland Cement were made by the Respondent Marquette Cement Manufacturing Company during the month of April, 1938, and to which shipments thereof were made during the said month pursuant to such sales.

14721 Mr. Zimmerman: The name of such destinations being repeated so as to show all instances of variations in freight rates or prices and different methods of packing, whether in paper sacks, cloth sacks, or bulk.

In the second column entitled "Point of Shipment," there appears the point of shipment opposite the destination for each variation in freight rate or price.

In the third column under the title "Freight Rate Per CWT." appears the freight rate as used on the original invoices for the various destinations and points of shipment in estimating freight to be paid on behalf of the shipper by the customer and to be allowed as a credit to the customer as a deduction from the sale price.

In the fourth column under the title "Unit Price" is set forth the barrel prices as shown on the several original invoices for the several destinations as listed.

In the fifth and last column under the title "Container," which sets forth the method of packing, whether paper sack, cloth sack, or bulk.

The journal records of Marquette Cement Manufacturing Company as to certain shipments contain the following memorandum: "C/M put through correcting price." The abbreviation "C/M" means credit memorandum.

14722 In certain other instances data appearing upon the face of the tabulations would require some explanation for the purposes of elucidation and for this purpose key numbers from 1 to 8, inclusive, have been set out to the extreme left of the tabulation sheets. These key numbers refer to explanatory footnotes appearing on the tabulation sheets 2 and 3.

We have also attached to the tabulation a form of invoice which is the exact duplicate of the original form of invoice that was sent out to the dealer of any invoice during the month of April so that it can be apparent what the terms and conditions were.

For purpose of testing the accuracy of the information contained in the tabulation, the Respondent Marquette Cement Manufacturing Company has offered and does now offer to exhibit to attorneys or other properly designated representatives of the Federal Trade Commission, copies of the matter contained in the original invoices. That is to say, our original journal sheets which I have in my possession covering all shipments of standard portland cement made by the Respondent Marquette Cement

Manufacturing Company to dealers at destinations specified in the schedule attached to the aforesaid subpoena duces tecum during the month of April, 1938, which shipments resulted from sales made by it during that month, upon the understanding and specific stipulation of
14723 record that the names of Respondent's customers and the amount of Respondent's sales and shipments as shown by Respondent's record will and shall remain the confidential information of the Respondent, and shall not be disclosed to any other person, firm, or corporation by the Federal Trade Commission or its authorized agent examining the said documents.

That is the end of my statement.

Mr. Wooden: Do I understand, from the latter part of what you read, Mr. Zimmerman, that you submit the tabulation and permit the checking against the journal record only on the condition that I agree and we agree that there must be no further question? In other words, we must agree that that represents a sufficient compliance with the subpoena to require no further steps on our part, or—

Mr. Zimmerman: Not at all. The only thing I am asking you to agreed to is that we do not disclose to any one else except you or your associates what we consider and have always considered as confidential and that is the names of our customers and amounts of our shipments. That has been one of the—well, may I say—ideas that Marquette Cement Manufacturing Company has clung to quite consistently, always, as has been indicated from this record from 1933, at least, right on down.

14724 Mr. Wooden: If you are willing to submit the tabulations under the checking arrangements that you refer to, and without requiring me at this time to state that that will be considered a full compliance with the subpoena, I am willing to accept it under those circumstances.

Mr. Zimmerman: Let us have a complete understanding on that. I don't know what you mean by a full compliance with the subpoena. I don't see how we could have complied with it any more fully. As a matter of fact, I think we are going further than technical compliance with the subpoena. We did not have any such records as they required.

Mr. Wooden: I am merely—

Mr. Zimmerman: And I did bring the witness, but it

did seem to me as a matter of being helpfully cooperative, we ought to give them the information which I thought it was quite apparent that they wanted regardless of any technicalities or the fact that they didn't know that we didn't have those records. It was no fault of theirs. I didn't even know it myself until Monday of this week.

Trial Examiner Norwood: As long as Marquette goes ahead and furnishes the information that you refer to here for consideration, without either side waiving any
14725 rights.

Mr. Zimmerman: I don't want them to waive any rights as to ask for any additional information, but I would like Mr. Wooden to agree that we have at least done our best not only to comply with the subpoena but to be helpfully cooperative.

Trial Examiner Norwood: He has to do that after you furnish this information and he sees what it is.

Mr. Zimmerman: I mean, that is a condition. He knows what it is. He has seen it.

Trial Examiner Norwood: Now, as for the names of customers, the names of the people on the invoices to whom the shipments were made, if they are put in here and put in evidence they cannot be kept secret.

Mr. Zimmerman: They will not be put in evidence.

Trial Examiner Norwood: They will be put in public records.

Mr. Zimmerman: That will not do.

Trial Examiner Norwood: That question can come up when they are offered in evidence.

Mr. Zimmerman: Well, I will not agree to produce any of this information except upon the understanding that the check be made confidentially so that they will not disclose the names of our customers or the amounts of our shipments.

14726 Mr. Wooden: There has been no thought of disclosure of all parties to whom these shipments were made, but as I suggested yesterday, the idea was to have them as a base for certain tabulations which would not disclose the names of individual customers. All I can say is that I don't want to treat other Respondents any differently than I do Marquette in that respect.

Mr. Zimmerman: Well, the other Respondents have made no such condition, and if they want to disclose the

names of their customers and the amounts of their shipments, that is up to them.

Trial Examiner Norwood: Yes.

Mr. Zimmerman: And I didn't interfere with that at all. I do think that I have leaned over backwards to try to be helpful here and shorten the labor that Mr. White or some other statistician might have to do.

Mr. Wooden: We appreciate your efforts, Mr. Zimmerman, and have no doubt they are made in entire good faith. The only thing I wish to suggest is that I do not wish to agree at this time, I mean as a condition, to your submitting the tabulations and permitting the checking you are referring to, or agree that that is a complete compliance with the subpoena.

14727 Mr. Zimmerman: Will you agree to this? Will you agree that it is compliance with the subpoena if we agree that you shall not be stopped to ask for any further information pertinent to the subject matter that you may desire? We will make no point of that. I just don't want to be left hanging in the air as to not doing our part in compliance with the subpoena.

Mr. Wooden: If what you mean by that is the difference between standing on the old subpoena and issuing a new one for such further information as might be desired—

Mr. Zimmerman: No, you don't even need to issue a new subpoena. We will agree that it is not essential for you to issue a new subpoena if the figures here are not as complete as Mr. White wants.

Mr. Wooden: That is all I want. In other words, I am willing to go just as far as we can.

Mr. Zimmerman: Yes. Otherwise, are we in accord?

Mr. Wooden: Without permitting ourselves not to go any further.

Mr. Zimmerman: Even with that, we are in agreement?

Mr. Wooden: I think so.

Mr. Zimmerman: Thank you.

14728 May I add that we have exhibited these tabulations, and may the tabulation and the form of the invoice be marked with some proper exhibit number?

Mr. Wooden: Yes, it should be.

Mr. Zimmerman: Some Commission's exhibit number for proper identification?

Mr. Wooden: That is right.

Mr. Zimmerman: All right, thank you.

14729 (Documents were thereupon marked for identification as Commission's Exhibits 2805-A, 2805-B, 2805-C, and 2806.)

Trial Examiner Norwood: Counsel for Respondents have retained some exhibits here so that they might make objections to them. They relate to the proffer of Commission's Exhibits, for identification, 2770 to 2777, and there may be others.

Can Counsel proceed with them now?

Mr. Wooden: Yes, sir.

Trial Examiner Norwood: Go ahead.

Mr. Leisure: As to Exhibit 2770, we have no objection.

The next exhibit, 2771, we object to; it is an inter-office communication from one salesman to another about bids which have already been opened. It is not binding on any other company, and we make the same objection to 2772, it being a mere inter-office communication, and the same as to 2774, being another inter-office memorandum.

We object to 2775 as incompetent, irrelevant, and immaterial, and being a letter from Mr. Cree to one of his dealers. We submit that it is not binding on any of the other companies.

14730 The next exhibit is by the same author, Mr. Cree, 2776. It is undated. It is unrelated to anything that would be binding on any other Respondent. We object to it as incompetent, irrelevant, and immaterial.

As to Exhibit 2773, we have no objection except that we ask that the handwriting Mr. MacIntyre says that he wrote on there be taken off, and otherwise we think it is needlessly encumbering the record. It doesn't prove anything.

As to the next exhibits, 2777-A to C, inclusive, we object to it as incompetent, irrelevant, and immaterial, no proper foundation having been laid for their introduction in evidence, and we ask that Mr. MacIntyre's handwriting be removed from the face of the exhibits.

That covers the exhibits which we had.

Trial Examiner Norwood: Well, I shall receive in evidence Commission's Exhibit, for identification, 2770, there being no objection. The others I shall retain until I have time to look them over, possibly over the lunch hour.

(COM. EX. 2770 was offered and received in evidence.).

14731 Mr. Zimmerman: Relating to the statement made by Counsel for Marquette Cement Manufacturing Company in response to the query from Mr. Wooden as to the subpoena duces tecum, I should like to present and request that Mr. Wooden give those documents such proper marks for identification as they should have.

Mr. Paulson: If Your Honor please, the invoices which Counsel for Respondents submitted on behalf of the Alpha Portland Cement Company is Commission's Exhibit 2710, with pages 1 to 213, I believe, inclusive.

Trial Examiner Norwood: 2710 and 2711.

Mr. Paulson: It was a copy of the duplicate exhibit that was called for by the subpoena which was marked and the agreement was that Counsel for the Commission would check the copy which was made with the duplicate that was called for and proffered by the Respondents' Counsel for checking, and then return the duplicate to Respondents at the earliest time.

The check has been made and it has been found that there are several errors in the copies. Now, I suppose the best procedure would be to read those errors for the record and ask Respondents' Counsel if it is agree-

14732 able with them that Your Honor order them to be made, or that they be made, and it be agreed also that the change be made in the handwriting of someone on the Commission and the initial handwriting afterwards. The copies, Your Honor, are in the handwriting, in many instances, of someone, and the figures are in the personal handwriting; they are not typewritten. So that any figure opposite which an initial appears will stand out as a correction made.

Trial Examiner Norwood: If Counsel reads the corrections into the record, it will not be necessary to initial them, because they can be verified at any time.

Mr. Wooden: It will be necessary to get the changes made on the invoices themselves.

Trial Examiner Norwood: Yes.

Trial Examiner Norwood: Read the corrections for the record.

Mr. Paulson: Page 46 of Commission's Exhibit 2710, in the "Less Freight at 8½ cents per hundredweight" col-

umn, it should show a total of 64.60 instead of 64, which it shows.

Page 50 of the same exhibit, in the line reading
14733 "Ten Barrels Mortar Cement in 40 Bags, Paper Bags, at 1.73 per barrel," "1.73" should be changed to "1.75," or, rather, "1.75" should be changed to "1.73."

Mr. Paulson: Page 68 of the same exhibit, the total figure opposite the "Less Freight" column, should be "$269.54" instead of "$289.54," as appears.

Page 166 of the same exhibit, in the line beginning "127 barrels Alpha cement—" the last figure in the line should be "$259.08" instead of "$259.06," and in the line beginning "switching charge," the last figure in the line should be "$6.93" instead of "$6.30."

Page 174 of the same exhibit in the line beginning "switching charge," the last figure in the line should be "$6.93" instead of "$6.30."

Page 197 of the same exhibit there is no agreement between the copy and the original, except for name, invoice and sale number. The figures do not correspond.

Will Counsel agree to substitute a correct copy of the duplicate invoice about which there is confusion?

Mr. Leisure: Yes, we will get the copy. You
14734 will observe, Mr. Paulson, they have the same invoice number "459" and 459 is on sheet 197; one is standard cement and the other is white cement. Those are the only corrections in that exhibit, Mr. Paulson?

Mr. Paulson: Those are the only corrections that our clerks found, in making the check.

We are returning the original duplicates to Counsel at this time (handing documents to Mr. Leisure).

Trial Examiner Norwood: The Reporter will please mark those that are returned. These are the duplicates that have been corrected.

Are you returning the originals to Counsel?

Mr. Paulson: That is correct, Your Honor.

14735 With regard to 2777-A to C, will you tell me what those were shown to be? I just want to recall the testimony.

Mr. Wooden: As I recall it, Mr. MacIntyre testified that those sheets were given to him by Mr. Crawford of the Lehigh Company, that the first sheet represented the base points and the base prices of the Lehigh mills used by them in the filing of delivered prices with the Code

Authority and that the other two sheets represented base prices at other mills also used by the Lehigh Company in filing delivered prices with the Code.

Trial Examiner Norwood: I recall that now.

Mr. McFadden: May I make a short statement for the record?

Trial Examiner Norwood: Certainly.

Mr. McFadden: In regard to the invoices submitted by the Alpha Portland Cement Company pursuant to its subpoena, Mr. Paulson called attention to the fact this morning that one of the invoices was submitted without a proper copy. This was inadvertent and the copy in question has been found and is now submitted to Coun-
14736 sel for the Commission. I refer to Exhibit 2711, page 197.

(COM. EXS. 2771, 2772, 2773, 2774 were offered and received in evidence.)

14738 EVERETT MacINTYRE was thereupon recalled as a witness for the Commission, and, having been previously sworn, testified further as follows:

14749 (COM. EX. 2807-A and 2807-B were offered and received in evidence.)

14750 By Mr. Wooden:

Q. Mr. MacIntyre, I am showing you exhibits marked for identification 2808, 2809, and 2810. What do you know as to the origin of those papers?

A. The paper marked for identification as Commission's Exhibit 2809 is a copy of an announcement by the Alpha Portland Cement Company to its dealers which was furnished to me in the offices of the Alpha Portland Cement Company, Easton, Pa., on June 2, 1933, by Mr. G. S. Brown, at that time president of the Alpha Portland Cement Company. The handwriting at the bottom of the sheet in the words "Sent only to dealers who had used truck service from Manheim—not broadcast," was placed on there in the offices of the Alpha Portland Cement Company in response to a request that I be informed as to what distribution the Alpha Portland Cement Company had made of the announcement of which this is a mimeograph, and I don't know whether it was Mr. Sweitzer, who is assistant to Mr. Coogan in that office, or Mr. Brown placed

that on there, but one of the two put that on there as information showing to what distribution they are given.

As to the Commission's exhibit marked for identification 2810, it is also an announcement or one copy of one of the announcements sent out by the Alpha Portland Cement Company, Easton, Pa., July 30, 193-, to its dealer trade.

14751 It was handed to me in the offices of the Alpha Portland Cement Company at the same time as the document marked Commission's Exhibit 2809 for identification was handed to me.

The handwriting appearing at the bottom of the document 2810 was placed on there under the same circumstances as the handwriting appearing at the bottom of Commission's Exhibit 2809, for identification.

The document marked for identification as Commission's Exhibit 2808 is a typewriten copy of a letter that I selected from the files of the Alpha Portland Cement Company and which was furnished to me by Mr. F. M. Coogan of the Alpha Company on September 4, 1931. The copy as typed was made in the offices of the Alpha Portland Cement Company and was checked in that office by me with the original for accuracy and correctness.

Mr. Wooden: I will offer Exhibits 2808, 2809, and 2810.

The Witness: Referring again to the document marked for identification, as Commission's Exhibit 2808, when I say that the copy was made in the offices of the Alpha Portland Cement Company, it was made there by a typist which was employed by me as a representative of the Federal Trade Commission and not by one of the employees of the Alpha Portland Cement Company, as I have stated.

14752 However, I checked that with the original from which the copy was made, and I can vouch for its accuracy. I can also say that that document, the original of which that is a copy, was taken from the files of the Alpha Portland Cement Company containing correspondence with its salesmen in the nature of instructions to its salesmen from the general sales offices.

Mr. Leisure: As to the Exhibits 2808, 2809, and 2810, we have no objection other than that we ask that they be received only against the company which is involved, and there is no showing that they were ever circulated or mailed to any other company or any other Respondent.

(COM. EXS. 2808, 2809, an 2810 were offered and received in evidence.)

14753 Q. Mr. MacIntyre, I am showing you a paper marked, for identification, as Commission's Exhibits 2811-A, B, and C. What do you know about the origin of those papers?

A. The documents marked, for identification, as Commission's Exhibits 2811-A and B are photostats of tabulations of the manner and method used by the Alpha Portland Cement Company in working out its bids that it submitted to the State of Illinois in 1933. It is for the letting of February 20, 1933. They were furnished to me, that is, the originals from which these photostats were made—were furnished to me by Mr. G. S. Brown of the Alpha Portland Cement Company upon the occasion of my visit to his office in July, 1933, when I was securing information from the cement industry concerning the bids which had been submitted to the State of Illinois and the State of Indiana during the years of 1932 and 1933.

Q. That statement applies to all three of the papers?

A. I haven't examined 2811-C, as yet.

2811-C is a work sheet which was used as a—a photostat of a work sheet which was used by the Alpha Portland Cement Company in its preparation of the bids as submitted to the State of Illinois in 1933. At least, that was the explanation given to me by Mr. Brown at the time he furnished me the original papers, 2811-A, B, and C.

14754 Q. Now, I am showing you papers marked 2812-A and B, for identification, and will you tell us what you know about the origin of those papers?

A. These are photostats of original papers containing tabulations of basing points and basing-point prices and destinations in the State of Indiana, basing points and basing-point prices shown on the tabulation were, according to Mr. G. S. Brown, used by the Alpha Company in figuring the bids submitted by the Alpha Company to the State of Indiana at December 22, 1932, letting.

Q. Was anything said regarding this heading in the middle "Competition"?

A. I don't recall other than the explanation and description given, any particular statement that was made about any of the figures that appear on the tabulations

Mr. Wooden: I will offer at this time, Your Honor, the papers marked 2811-A, B, and C, and 2812-A and B.

Mr. Leisure: May I ask Mr. MacIntyre a question, Your Honor?

Trial Examiner Norwood: Certainly.

Examination on Voir Dire by Mr. Leisure.

Q. In your description of the Exhibit 2811, Mr. MacIntyre, you described it as a tabulation. I observe in the back there is a certain worksheet there. Was that handed to you at the same time that the tabulation was?

14755 A. It was. That is 2811-C, I believe, is the number attached to it. It was handed to me at the same time as being a part of the work sheets, 2811-A, B, and C, used by the Alpha Company in figuring the bids that it submitted to the State of Illinois.

Mr. Leisure: We have no objection, Your Honor, to these exhibits as far as the Alpha Company is concerned. We do object, however, on behalf of all the other Respondents. The method or manner in which one company makes up its tabulation for bids is not material or relevant and not binding on any other company or Respondent.

(COM. EX. 2811-A, 2811-B, 2811-C, 2812-A, and 2812-B, were offered and received in evidence.).

14757 Q. Were you denied access to any files?.

Mr. Leisure: Oh, I object to that. It is immaterial and taking up time and space on the record unnecessarily.

Trial Examiner Norwood: Have you produced letters from these files?

Mr. Leisure: All these exhibits are from that company, that very company, the exhibits we have spent this afternoon on so far.

Mr. Wooden: He has just testified he was permitted to examine certain files that he described.

Trial Examiner Norwood: And then he was denied access to other files; is that right?

Mr. Wooden: That is the question.

Mr. Leisure: That is the question, and that is the question I am objecting to because if he was not denied access to them it would not prove anything in the case, and if he was it wouldn't prove anything in the case. We are just taking up time unnecessarily unless Counsel is

laying the basis for some other proceeding other than the one we are now spending our time on now.

Trial Examiner Norwood: Counsel might argue or draw an inference from the fact that other communications weren't secured. I think he can show it for that.

We have ruled out some similar testimony here sim-
14758 ply to show that at one time they refused it and another time they did not. I didn't see any point to that.

Mr. Leisure: If they constantly refused, they were entirely within their rights, and I don't see why we spend time on it.

Trial Examiner Norwood: Well, I will let him answer this one.

A. Well, with respect to these files carrying instructions to salesmen, I was not permitted to examine them. I was permitted to examine only material that was taken from the files and handed to me by Mr. F. M. Coogan. He stated that an examination of the files by me might disclose statements, loose statements, as he called them, that had been dropped from time to time by salesmen that had no particular significance and that should not be disclosed to people outside of his company. So he only showed me certain letters that he had taken from those files.

14759 This document, 2708, happens to be one of the documents that Mr. Coogan handed me from the files. I didn't make an examination of the files. If my previous testimony shows that I did, it should be corrected to show that I made an examination of the sales instructions files; that is, the material from those files such as Mr. Coogan handed to me after he had gone over the files.

14762 Q. What are the papers I show you marked Commission's Exhibits, for identification, 2813-A, 2813-B and 2814, Mr. MacIntyre?

A. The papers marked for identification as Com-
14763 mission's Exhibits 2813-A and 2813-B is a letter from Mr. Walter S. Wing, general sales manager of the Pennsylvania-Dixie Cement Company addressed to me under date of June 1, 1933. It was in response to a letter that I had submitted to Mr. Wing under date of May 31, 1933.

I would like to state that during an interview I had with Mr. Wing on May 29, 1933, I had inquiry as to the manner

and method that the Pennsylvania-Dixie Cement Corporation had used in figuring and calculating the prices that it submitted in sealed bids to the State of Illinois and Iowa in previous lettings; that is, immediately preceding my visit to the offices of the Pennsylvania-Dixie.

He stated he had used the applicable basing-point prices and the freight rates to the destinations; that is, the lowest combination of the applicable basing-point prices and freight rates.

I then asked him in my letter of May 31, 1933, to submit to me a tabulation of the basing-points and basing-point prices that his company had used in their submission of the prices in the sealed bids in the States of Illinois and Iowa. This letter marked for identification Commission's Exhibits 2813-A and 2813-B is from Mr. Wing giving the list of basing points and base-point prices in figuring their prices which were submitted to the State of Illinois.

14764 The document marked for identification as Commission's Exhibit 2814 submits the tabulation of basing points and basing-point prices used by the Pennsylvania-Dixie Cement Corporation in their figuring of the prices submitted to the State of Iowa.

Mr. Wooden: I offer in evidence Commission's Exhibits 2813-A, 2813-B, and 2814, for identification (handing documents to Mr. Leisure).

Trial Examiner Norwood: Are there any objections to the proffer?

Mr. Leisure: 2813-A and B, and 2814 appear to be letters from the Respondent Company to Mr. MacIntyre, the witness, as attorney-examiner, and they show on their face that they are in response to a letter from Mr. MacIntyre. In fact, the first paragraph in 2813-A starts with "In response to paragraph No. 3 of your letter, dated 14765 May 31, 1933."

We object to the answers to correspondence going into evidence unless the questionnaire or the remainder of the correspondence is produced and offered in evidence. We also have already stated our objections to correspondence between the Commission and the Respondents being offered in evidence in this proceeding, and we renew those objections at this time.

Trial Examiner Norwood: Anything further?

Mr. Zimmerman: No.

Trial Examiner Norwood: Can you furnish the copy of the letter?

The Witness: I can't furnish the letter, Your Honor, that went to Mr. Walter Wing of the Pennsylvania-Dixie Cement Corporation.

Trial Examiner Norwood: The letter was sent to him, the original, was it?

The Witness: The original letter was given to him in the offices of the Pennsylvania-Dixie Cement Corporation, and it was prepared there in New York, and I am not certain but what it was prepared in the offices of the Pennsylvania-Dixie Cement Corporation.

As to whether or not I kept a copy of it, I am not sure. If I did keep a copy, I will probably have it in my files
14766 and if I can locate it, I will be happy to bring it into the room here.

Trial Examiner Norwood: Well, I think that that is very clear, that it was a request for information, and that the statements in the letter certainly stand alone without any other explanation.

(COM. EXS. 2813-A, 2813-B, and 2814 were offered and received in evidence.)

Q. Mr. MacIntyre, I show you a paper marked, for identification, as Commission's Exhibit 2815, and 2816, 2817, and 2818.

What do you know as to the origin of those papers?

A. Documents marked, for identification, as Commission's Exhibits 2815, 2817, and 2816 are photostats of work sheets which I secured from the files of the Pennsylvania-Dixie Cement Corporation, and, more specifically, from that corporation's file on a Government project relative to bids that they had submitted to the Federal Government, they and their competitors had submitted to the Federal Government on that project.

I may state further that these photostats were
14767 made from original documents that were furnished to me by Mr. Blaine Smith and Mr. Walter S. Wing of the Pennsylvania-Dixie Cement Corporation on May 31, 1933, after I had selected the originals from the files of the Pennsylvania-Dixie.

The document marked, for identification, as Commission's Exhibit 2818, was taken—is a photostat of a document taken by me from the files of the Pennsylvania-Dixie relating to its bids to the State of Iowa, in 1931. After I

had selected it from the files, that is, the original from the files, Mr. Blaine Smith and Mr. Walter Wing of the Pennsylvania-Dixie Cement Corporation permitted me to have a photostat of the document made.

By Mr. Wooden:

Q. Referring to Commission's Exhibit 2817, for identification, do you know whose initials "F. J. S." are that appear thereon?

A. Mr. Frank J. Sellinger, an assistant in the office of the president of the Pennsylvania-Dixie Cement Corporation, New York.

Q. Do you know who "Walt" on Commission's Exhibit 2817, for identification, is?

A. No, I do not. My only thought on that is it is Mr. Walter Wing, of that organization. That was a work sheet—there was a note on the work sheet in the files 14768 that I have described.

Mr. Wooden: I offer these papers marked Commission's Exhibits 2815 to 2818, inclusive, in evidence.

Mr. Leisure: May I ask Mr. MacIntyre a question about this exhibit?

Trial Examiner Norwood: Certainly.

Examination on Voir Dire by Mr. Leisure.

Q. Commission's Exhibit 2817, Mr. MacIntyre, Mr. Wooden asked you about "F.J.S." Were you present when "F.J.S." was written there?

A. No, I was not.

Q. And do you know of your own knowledge who "F.J.S." is, as to this particular document?

A. Mr. Wooden asked me who the "F.J.S." initials were, and I told him those were Mr. Frank J. Selinger, assistant to the president of the Pennsylvania-Dixie Cement Corporation.

Q. If you weren't present when he wrote them on there, do you know of your own knowledge that they are his initials or anyone wrote them there under his instructions or on his behalf?

A. I don't know who put them on there. I am only telling you whose initials they are. As to who wrote them, I couldn't say.

Q. They may be other initials of someone else,
14769 may they not?

A. It could be Frank J. Smith, but Frank J. Selinger was in that particular office.

Q. And as far as you know, of your own particular knowledge, this may be Mr. Frank J. Smith; isn't that so?

A. That is true; exactly.

Trial Examiner Norwood: Is there any objection?

Mr. Leisure: Yes, Your Honor.

As to Exhibits 2815, 2816, and 2817, we object to them as incompetent, irrelevant, and immaterial; no proper basis having been laid for their introduction into evidence.

As to Commission's Exhibit 2818, for identification, we object to it as being mere inter-office communication, and if it be received we ask that the receipt be confined to the company involved.

There is no showing that it was used or came to the notice of any of the other Respondents, in any way.

(COM. EXS. 2815, 2816, 2817, and 2818 were offered and received in evidence.)

14771 Mr. Wooden: I offer at this time, Your Honor, a paper marked Commission's Exhibit 2819, for identification, being an original letter of the Wabash Portland Cement Company addressed to the Federal Trade Commission. I am offering it on the assumption that further identification will not be required, subject to check.

Trial Examiner Norwood: Any objections?

Mr. Leisure: We raise no point as to the identification. We do, however, make the same objections as heretofore made with reference to communications with the Federal Trade Commission, and we object to this document, 2819, being received in evidence unless and until the letter
14772 from the Federal Trade Commission, which caused this document to come into being, be produced here.

Mr. Wooden: Is there any reference on that to another letter?

(COM. EX. 2819 was offered and received in evidence.)

14777 By Mr. Wooden:

Q. What is the paper I show you marked Commission's Exhibit 2820, for identification?

A. The document marked for identification as Commission's Exhibit 2820 is a letter which I received from Mr.

W. A. Davis, vice-president of the Standard Portland Cement Company in Cleveland, Ohio, under date of June 29, 1934.

It was sent to me in response to a request that I made, oral request that I made of Mr. Davis for the list of basing points and basing-point prices which he had informed me his company had used in calculating the delivered prices that they had filed with the Cement In-
14778 stitute pursuant to the Code.

Mr. Wooden: I offer Commission's Exhibit 2820, for identification, in evidence (handing document to Mr. Leisure).

Mr. Leisure: As to Exhibit 2820 we make the same objection we have heretofore made without restating it with respect to the correspondence between the Respondents and the Federal Trade Commission plus the fact we also object, this being and having to do exclusively with the Code.

It says, "basing points and prices on which prices which were figured that we filed with the Code Authority." On those ground we object to the exhibit as incompetent, irrelevant, and immaterial.

(COM. EX. 2820 was offered and received in evidence.)

Q. What do you know, Mr. MacIntyre, as to the origin of papers marked 2821 and 2822, for identification?
14779 A. The document marked as Commission's Exhibit 2821 is a photostat of a document which I selected from the files of the Pittsburgh Plate Glass Company, Columbia Cement Division, Pittsburgh, Pa., on March 12, 1932. It was selected, more particularly, from the files containing instructions to salesmen. The document was furnished to me by Mr. L. C. Letzkus, sales manager of the Columbia Cement Division of the Pittsburgh Plate Glass Company.

The document marked for identification as Commission's Exhibit 2822 is a photostat of a document I selected from the files of the Diamond Portland Cement Company on March 23, 1932, and which was furnished to me by Mr. R. D. Raff of the Diamond Company on that date.

(COM. EXS. 2821 and 2822 were offered and received in evidence.)

14781 Q. What do you know about the origin of the paper I hand you marked Commission's Exhibit 2823, for identification?

The Witness: The document marked for identification as Commission's Exhibit 2823 is a list of basing
14782 basings and basing-point prices.

Mr. Leisure: I object to the characterization of the paper. It will speak for itself if it is a list of basing points and basing-point prices, and if it does not so speak, then the testimony of the witness is improper.

Trial Examiner Norwood: Read his answer up to this time.

(Record read.)

Trial Examiner Norwood: Do you want that stricken?

Mr. Leisure: Yes, Your Honor.

Trial Examiner Norwood: The motion is allowed. "A list of basing points and basing-point prices" may be struck as part of the answer to the present question.

The Witness: May I have the present question read?

Trial Examiner Norwood: My question was the last one. Tell us what it is and where you got it.

The Witness: If Your Honor please, when I tell you what it is, I can only give you an answer that I gave you a few moments ago.

Trial Examiner Norwood: It is a paper that was given to you by somebody, and, if so, by whom?

The Witness: Yes, I can state that it is a piece of paper.

14783 Mr. Leisure: That is right.

The Witness: That was given to me by Mr. Charles Smutz, an official of the Bessemer Limestone & Cement Company.

Trial Examiner Norwood: Did you ask him for some particular kind of a paper?

The Witness: He gave it to me on June 27, 1934.

Trial Examiner Norwood: Yes.

The Witness: What was your question?

Mr. Leisure: I submit that identifies the paper.

Trial Examiner Norwood: What did you ask him for?

The Witness: I asked him for a list of basing points and basing-point prices, which he stated his company had used in figuring the delivered prices that his company had filed with The Cement Institute pursuant to the Code. In response to that request, he gave me this paper.

I noticed when he gave it to me that it carried no explanation as to whether the prices shown on there were net. I asked him to state whether or not they were.

Mr. Leisure: Just one moment. I move to strike out that part of the witness' answer as to what he noticed.

Trial Examiner Norwood: The motion is allowed. Strike the matter after the words, "I noticed."

14784 Mr. Wooden: I still fail to see why my original question of what he knew about the origin of this paper isn't completely satisfactory to every one concerned.

By Mr. Wooden:

Q. Mr. MacIntyre, referring to the pencil handwriting on the top and bottom of this paper, 2823, whose is it, if you know?

A. That is in my handwriting. The words "prices are net" and "less 10 cents cash discount" at the top are in my handwriting, and the words "submitted by Mr. Charles Smutz, Bessemer, 6-27-34" at the bottom are in my handwriting.

Q. When was your handwriting placed on the paper?

A. At the time Mr. Smutz gave me this paper.

Q. How did you come to put the handwriting on the top of the paper about prices are net?

A. I noticed when Mr. Smutz handed me this paper, that there was no showing on the paper as to whether the prices were net or whether they included cost of package, and I asked him for an explanation as to whether they were net or not, and he said they were. So I wrote that at the top of the page. I also wrote the words "submitted by Mr. Charles Smutz, Bessemer" at the bottom of the paper so as to aid me in my identification of the paper if it became necessary at some later date.

14785 (COM. EX. 2823 was offered and received in evidence.)

Q. Now, Mr. MacIntyre, I show you two papers 14786 marked 2824 and 2825, for identification. Where did you first encounter those papers?

A. The document marked, for identification, as Commission's Exhibit 2824 is a photostat of a document that I selected from the files of the Castalia Portland Cement Company, Cleveland, Ohio, on March 24, 1932.

Mr. McKeon, sales manager in the Cleveland District for the Castalia Company permitted an examination of the files and furnished me with the original of which this is a photostat at that time.

The document marked, for identification, as Commission's Exhibit 2825 is a photostat of a document which I selected from the files of the Peerless Cement Corporation, Detroit, Mich., on November 3, 1931. The document after I selected it from the files of the Peerless Company was furnished to me by Mr. Luck, Charles Luck, sales manager for that company, and had the photostat made and returned the original to him.

Mr. Wooden: I offer these two papers, 2824 and 2825.

14787 Washington, D. C.,
January 27, 1939.

14790 EVERETT MacINTYRE was thereupon recalled as a witness for the Commission, and, having been previously sworn, testified further as follows:

14791 Mr. Leisure: We have no objection, Your Honor, to Exhibit 2824. As to 2825, we object to it as incompetent, irrelevant, and immaterial, no proper basis having been laid for its introduction in evidence.

14792 (COM. EXS. 2824 and 2825 were offered and received in evidence.)

Direct Examination by Mr. Wooden (Continued)

Q. Mr. MacIntyre, I show you papers marked, for identification, as Commission's Exhibits 2826, 2827-A, B, and C. What do you know as to the origin of those papers?

A. The documents marked, for identification, as Commission's Exhibits 2827-A, B, and C, are photostats of documents that I found in the files of Mr. Charles Conn, C-o-n-n, president of the Giant Portland Cement Company, Philadelphia, Pa., and which after I had requested that he furnished me with copies of the original after he had made copies of the same, he furnished by letter, which is represented by a document marked, for identification, as Commission's Exhibit 2826.

Q. Did you receive these papers from Mr. Conn under any condition or pledge of treating them confidentially?

A. I did as to that immediate time.

14793 Q. Would you describe what you mean?

A. The papers, according to Mr. Conn, dealt

with cost information on a number of cement manufacturing concerns in the Lehigh Valley District that were contemplating a merger, and Mr. Conn stated that that information as to relating to each of those companies he would like kept in confidence as long as that merger was pending. He was one of the moving forces, as I understood from him, behind the proposed merger, and he was fearful that if it was disclosed at that time that it would interfere with some of the merger plans, but beyond that he didn't request that it be held in confidence.

Q. What time was it, of which you speak?

A. That was in 1931. I learned from Mr. Conn on a later occasion that the merger plans had been abandoned.

Mr. Wooden: I will offer Commission's Exhibits 2826 and 2827-A, B, and C (handing documents to Mr. Leisure.)

Mr. Leisure: We object to Exhibits 2826 and 2827-A, B, and C on the ground that they are incompetent, irrelevant, and immaterial.

14794 Mr. Wooden: I would like to say, Your Honor, that the purpose of offering these papers is in order to show that costs of different plants and different companies do vary substantially and not with any idea of showing the absolute character of any cost for any particular company or of the relation of cost to the price of any particular company.

Mr. Zimmerman: May I ask what is the purpose?

Mr. Wooden: To show that costs vary very substantially.

Mr. Zimmerman: As between various companies?

Mr. Wooden: Yes.

Trial Examiner Norwood: Well, I, in examining the papers there, saw it related to various costs of various mills, and you can readily see that it is relevant, but if it comes in, as I understand it, you wish its application limited?

Mr. Wooden: That is what I am trying to say, Your Honor. I do wish its application limited to that issue of whether costs of different plants are approximately the same. The part of the propaganda of the industry with regard to justification or explanation of identical delivered prices is based either on the assumption or upon the claim that costs are approximately the same.

14795 Trial Examiner Norwood: If Counsel offers it for a limited purpose, I don't see it is my province

to receive it for other purposes, and if it is relevant I may receive it for that purpose, which I now do, as limited, but the Counsel for the Respondents may offer it for other purposes at a later date or at any time they wish
14796 to, and if that purpose is such as to render it proper to be used, then I will receive it.

Mr. Leisure: I know of no practice, Your Honor, whereby Counsel offering an exhibit can limit his offer. He can physically offer part of an exhibit but to say it will show what he wants it to show and will show nothing else, I know of no such practice and I object to the limitation for a single purpose that he may have in mind. If the exhibit is in evidence any inferences that are proper to be drawn from the exhibit may be drawn by either side.

Trial Examiner Norwood: Does Counsel contend that the documents may not be offered for one purpose and not generally; that documents may never be offered except generally?

Mr. Leisure: That is right. He can separate the exhibits and offer the exhibit to show—I mean, he can offer a portion of an exhibit, but to offer an exhibit and say that it shall be limited to the purposes for which he is offering it, I know of no such practice. If there are other inferences in the exhibit which Counsel is not interested in but which we may be interested in, then we have a right to draw those inferences.

Trial Examiner Norwood: Oh, you have a right to offer, too.

14797 Mr. Leisure: We offer the whole exhibit, and we object to it being received on any other basis.

Trial Examiner Norwood: What have you to say about that, Mr. Wooden?

Mr. Leisure: I will not attempt to amend his offer. I will simply say that we object to it being offered in any other way than offering the whole exhibit.

Mr. Wooden: As far as I am concerned, I stand on my offer as made. If it is to be received for other purposes, why, it will not be on the basis of my offer. That is all I can say.

Trial Examiner Norwood: I overrule the objections and receive the documents for the purposes stated.

Mr. Wooden: I would also like to say that I ordinarily would not go into the matter of the individual company

costs because I recognize that they consider such information somewhat confidential, but here is a case where they didn't consider it confidential but submitted it to each other, and that is the basis in part of my offer.

14828 Mr. Wooden: Your Honor, I am offering at this time a paper marked 2828, for identification, being 14829 page 3 of the answer of the Lone Star Cement Company of Kansas to question No. 10 propounded to them by the Federal Trade Commission, in May, 1931, and I am offering just this one paper because other answers were made to other questions, and the other answers contain information which I do not wish to use and which I believe the company would not like to have used.

I have spoken to Mr. Leisure about this method of presentation, and understand that he will raise no objection to that form and method of offer, provided the question to which this is a reply appears of record, and that question is as follows:

"Name the basing points or points used in determining the delivered prices of cement sold and shipped from each plant. State the company's price per barrel of cement in cloth sacks f.o.b. plant and at each basing point on January 1, 1929, and give each change in prices with the date and amount thereof from January 1, 1929, to date."

Mr. Leisure: What is the date of the questionnaire, Mr. Wooden?

Mr. Wooden: May 25, 1931.

Mr. Leisure: And that is addressed to the Lone Star Company?

Mr. Wooden: Of Kansas at Kansas City.

14830 Mr. Leisure: And it is signed by whom? Who is it from?

Mr. Wooden: H. L. Anderson, chief examiner.

Trial Examiner Norwood: Is there any objection to this exhibit?

Mr. Leisure: We have previously stated at length objections to exhibits which were offered when they were obtained on questionnaires from the Federal Trade Commission. Without taking up space in the record, we renew those objections to this exhibit.

Trial Examiner Norwood: No objections otherwise?

Mr. Leisure: None as to the identification.

(COM. EX. 2828 was offered and received in evidence.)

Mr. Wooden: Following a similar procedure with ref-

erence to a paper which I have had marked as 2829-A and 2829-B, I am offering just that portion of 2829-A which
answers question No. 10 of the questionnaire ad-
14831 dressed to the Wolverine Portland Cement Company, and the text of which No. 10 is the same as I read for the Lone Star of Kansas.

I also offer 2829-B, which is the Wolverine Portland Cement Company's answer to question No. 11 of the same questionnaire, and which reads:

"Give full explanation of your methods of determining delivered prices of cement at any particular point when submitting sealed bids or when meeting other competition."

That was addressed to the Wolverine Company on May 11, 1931, by H. L. Anderson, Chief Examiner.

Give this the next number.

(COM. EX. 2829-A and 2829-B was offered and received in evidence.)

Mr. Wooden: I now offer in evidence a paper which
has been marked for identification as Commission's
14832 Exhibit 2830, being the file copy of a letter from L. O. Cox, vice-president and sales manager of the Republic Portland Cement Company of San Antonio, Texas, under date of October 10, 1934, and addressed to Mr. Charles Baumbarger, trustee of the Cement Institute, District No. 9.

I offer the document subject to check and production of the original addressed to a trustee of the Institute, as I have stated.

I offer it on the ground, also, that the Republic Portland Cement Company at the time of the writing of the letter was a member of the Respondent Cement Institute, and the communication is to a trustee of the Institute.

Trial Examiner Norwood: Any objection?

Mr. Leisure: I haven't read it, Your Honor, but without taking time to read the substance, it is very clear that the document is incompetent, irrelevant, and immaterial: a vice-president—unsigned, a vice-president of the Republic Portland Cement Company which was not a Respondent.

Counsel suggests I check. I have no authority or reason to check with companies whom I do not represent.

It is also addressed to Mr. Charles Baumbarger, Junior,

Trustee, whom I understand is also an employee of
14833 the Republic Portland Cement Company, so what we have here is an inter-office communication between members of a non-respondent, and I am asked to check as to whether or not they wrote it.

Mr. Wooden: It is addressed to an officer of the Institute represented by Mr. Leisure, a trustee of the Institute. My understanding is that at that time Mr. Baumbarger was connected with another company than Republic; the San Antonio—.

Mr. Leisure: There is no evidence of that fact. If that is the fact, I don't know it.

Trial Examiner Norwood: Counsel may retain that and we will rule on it when we reconvene.

14845 Mr. Wooden: I believe there is an offer pending, just before recess.

Trial Examiner Norwood: Any objection to the proffer?

Mr. Leisure: I believe, Your Honor, we stated our objections to the exhibit. At least I am sure we stated some objections.

I might add that we add the further objection that it occurred during the code period.

I have pointed out that that is written by a representative of a non-respondent and we feel that anything that a representative of a non-respondent might say or write is not binding on the Respondents in this case.

Mr. Wooden: I would like to inquire whether the objections go to the matter of the identification of the
14846 document.

Mr. Leisure: If it means that Mr. Wooden wants us to check with the company in any way, I have no way of doing it because I don't represent them and they are not Respondents.

Mr. Wooden: I asked you to check with a former trustee of the Institute to whom the letter was addressed.

Mr. Leisure: That wouldn't show the letter was written by the purported author, Mr. Wooden.

Mr. Wooden: I want to know whether you are insisting that the document is not properly identified or do you want us to call Mr. Cox from San Antonio for that purpose?

Mr. Leisure: I don't make any objection to the letter being a purported copy of the letter written October 10,

1934. I make no objection as to that. My objection is it is not written by a Respondent.

Trial Examiner Norwood: I shall reserve this for consideration. I haven't had time to read it, and I don't want to delay the hearing now.

14877 Washington, D. C.,
February 6, 1939.

14878 Mr. Wooden: Your Honor, before that, I would like to inquire about certain things that were asked for on the record in Kansas City, before we go ahead.

14879 I believe I also asked, in Kansas City, for a statement of the membership of Ash Grove in the Portland Cement Association, and for a production of a copy of the Kansas City Bureau, Code of Ethics. I think I made that request of Mr. Sunderland.

Mr. Leisure: I have here a letter from Mr. Sunderland this morning setting out the membership in Portland Association (handing paper to Mr. Wooden).

Mr. Wooden: Thank you.

Mr. Leisure: I have no code of ethics, as far as I know the record shows that they did not have any, or, at least, if they did, no one knew what it was. I do not think there is any evidence that there was any ever adopted. If there was any adopted, I haven't seen it, and the witnesses have not—

Mr. Wooden: I suppose under the circumstances—

Mr. Leisure: —indicated that there was.

14882 Trial Examiner Norwood: Have objections been stated to this pending proffer here, Commission's Exhibit 2830, I believe they have?

Mr. Leisure: Yes, sir, we stated our objection.

Trial Examiner Norwood: The objections are overruled, and that exhibit, Commission's Exhibit 2830, is now received in evidence.

(COM. EX. 2830 was offered and received in evidence.)

Mr. Wooden: Mr. Leisure, might I inquire if the Lone Star papers which I had marked for identification in Kansas City with a suggested stipulation as to their identification, are the duplicates of some of the Texas papers?

Mr. Leisure: We can report by two o'clock as to that.

Trial Examiner Norwood: There are some other exhibits here, on which the proffer is pending, Commission's

Exhibit 1975 to 1983, of which copies were delivered to Mr. Brick. Commission's Exhibit 1975-A, and so forth, to and including Commission's Exhibit 1983,—what are they?

Mr. Withrow: With the exception of Commission's Exhibit 1977.

14883 Trial Examiner Norwood: With the exception of 1977?

Mr. Withrow: Yes.

Trial Examiner Norwood: Have objections been stated to those?

Mr. Leisure: No, they have not.

Trial Examiner Norwood: Do you wish to retain them for further study, or not?

Mr. Leisure: No, we are prepared at any time that Mr. Wooden wants to take it up, if he wants it now, or later.

Mr. Wooden: I will be glad to have it taken up.

What are those, if you please?

Mr. Withrow: These are Riverside prices.

Mr. Wooden: I think those should be disposed of before Mr. White takes the stand.

Trial Examiner Norwood: Well, now I understood that would be given to me during the week for perusal after the Counsel had finished, and he evidently has forgotten that. So if you will deliver them to me now I will be ready to rule on that tomorrow.

Mr. Leisure: So that Your Honor will have in mind our objections, shall I state our objections now so that you can consider them in conjunction with the exhibits?

Trial Examiner Norwood: Yes.

14884 Mr. Leisure: I think it was on January 27 that these exhibits, Commission's Exhibits 1975, 1976, 1978, through 1983, inclusive, were given to us for study in order that we might state our objections.

The exhibits are announcements and maps issued by the Riverside Portland Cement Company covering price, terms, and conditions of sale in the territory of southern California.

These documents were submitted to Mr. Wooden at a hearing in Chicago on his oral request or demand on Mr. Beckett of the Riverside Company and upon counsel for the Respondents.

We object to their admission in evidence on the ground that they are irrelevant, incompetent, and immaterial and on the further ground that the documents do not prove or tend to prove any of the issues stated in the Complaint.

The record to date clearly indicates that the delivered prices calculated on the basing point method are not employed in southern California and documents proving or tending to prove the existence of zone prices in southern California are not material or relevant to the issues involved in this case.

On all of these grounds and on the additional grounds that the documents date back to 1927 through 1930
14885 inclusive and are much too remote, we request that they not be received in evidence, and we object to them on all these grounds.

Trial Examiner Norwood: I shall retain these for study and reserve my ruling.

14891 (COM. EXS. 1975, 1976, 1978, 1979, 1980, 1981, 1982, 1983, were offered and received in evidence.)

14906 Trial Examiner Norwood: 1105. There is a motion to withdraw Commission's 1105. Is there any objection to that?

Mr. Zimmerman: Sir?

Mr. Leisure: Yes.

Mr. Zimmerman: Withdraw? Yes, absolutely.

Trial Examiner Norwood: It will not be withdrawn.

14976 Mr. Zimmerman: I want to move to strike out the
14977 entire list of exhibits that were produced and offered in evidence, from 1098, 1099-A to AA, 1100-A, 1100-B, 1101-A and 1101-B, 1102-A and B, 1103-A, B, C, 1104, 1105—well, I guess one of those were just withdrawn.

Mr. Wooden: 1105 was. But I don't know whether—

Trial Examiner Norwood: I have 1104 withdrawn and 1105 was not.

15004 Washington, D. C.,
February 7, 1939.

15006 Mr. Wooden: Your Honor, pardon me for taking the floor, first.

The Reporter has given me this statement, involving a correction of the Kansas City hearing on January 16, and I will read what he has given me:

"At the hearing held January 16 at Kansas City, Mo., on page 13773 exhibits 2445-A to O, 2446-A to O, and 2448-A to O should have been identified as 2445-A to P, 2446-A to P and 2448-A to P, respectively.

"Likewise, on page 13774 exhibit 2446-A to O should have been received in evidence as 2446-A to P.

"In the index for the same day 2445-A to O, 2446-A to O and 2448-A to O should have been listed as 2445-A to P, 2446-A to P and 2448-A to P, respectively."

I believe those exhibits listed are shown to have been received in evidence on page 13774 of the transcript.

Mr. Leisure: Should have been received? Does it mean that the markings were not made on the exhibits?

Trial Examiner Norwood: Should have been received. Yes, that refers to the markings, entirely.

Thank you for straightening that out, Mr. Reporter.

15007 HUGH E. WHITE resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Leisure.

While we are dealing with the numbering of exhibits, if I can dispose of this now, I won't have to continue to carry these with us.

Certain exhibits were numbered in Chicago; for identification, Commission's Exhibit 2054 is marked and then the following exhibit didn't receive a number; it stands blank. It should have a number.

Then the next exhibit, 2055 for identification, is marked.

Then the next page is not marked. It should receive a number.

I will show this to your Honor so that you can see what I mean.

(Mr. Leisure shows documents to the Examiner.)

15008 (Mr. Leisure consults with the Trial Examiner at the bench, out of the hearing of the Reporter.)

Trial Examiner Norwood: On the record.

Let the telegram which is dated May 7, and previously marked Commission's Exhibit 2054, be marked 2054-A, and let the telegram dated May 3, 1935, be marked Commission's Exhibit 2054-B, both for identification.

(Thereupon, the telegrams referred to were marked Commission's Exhibits Nos. 2054-A and 2054-B, respectively, for identification.)

Trial Examiner Norwood: And let the document heretofore marked Commission's Exhibit 2055 be marked as

Commission's Exhibit 2055-A, and a similar document from the Monolith Portland Cement Company, issued March 28, 1935, and marked file No. 35-18, be marked for identification Commission's Exhibit 2055-B.

(Thereupon, the documents above referred to were marked Commission's Exhibits Nos. 2055-A and 2055-B, respectively, for identification.)

15241 Washington, D. C.,
February 9, 1939.

15253 Mr. Wooden: Your Honor, I wish to offer at this time some papers which the Reporter has marked for identification as Commission's Exhibits 2835, 2836, 2837, 2838 and 2839. They are reproductions of
15254 certain advertisements over the name of the Cement Institute and I assume there will be no difficulty about the matter of their identification.

15255 Mr. Leisure: If Your Honor pleases, these exhibits are not unfamiliar to us, because they are advertisements heretofore used by the Commission prior to this case, in turning them over to the Senate Interstate Commerce Committee hearings, when the Wheeler so-called Anti-Basing Point hearings were being held for the purpose of securing legislative action against basing points. The Commission used them then in giving them to that Committee, and we are thoroughly familiar with them, without taking time to read them, but when they are offered in this way, without any witnesses, without any showing how they were used, or for what purpose they were used, they are totally irrelevant, incompetent, and immaterial in this case. They do not prove, or tend to prove, any of the issues in the case, and we think they should be ruled out.

Trial Examiner Norwood: Does Counsel make any point as to identification?

Mr. Leisure: No, I don't make—those are advertisements that we ran, and, as I said, they have previously been used as I have suggested.

15256 Mr. Wooden: Your Honor, paragraph 7-J of the complaint charges Respondents with having circulated these for public advertisements in which false repre-

sentations were made that the basing point method
15257 of pricing cement was practiced in order to discourage monopolistic practices and preserve free competition.

15258 (COM. EXS. 2835, 2836, 2837, 2838, and 2839, were offered and received in evidence.)

DR. EDWARD A. DUDDY, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am Professor of Marketing, School of Business,
15259 University of Chicago. I have been in the school either as an assistant Professor, or Professor, for 18 years, since 1920. I have specialized in that I have given particular attention both in teaching and in research to marketing of agricultural products. A general yet comprehensive idea of the extent of my researches and writings in that field is that they take the form of books and articles, one brief discussion of the cold storage industry in the United States, published in book form by the University of Chicago Press in 1929; a study of the agriculture of the Chicago region published by the same organization in book form, I think that is in 1929 or 1930; a monograph publication dealing with market areas, published in a series of studies called "Studies in Business Administration" by the University of Chicago Press, the first of these in 1931, entitled, "The Supply Area of the Chicago Live Stock Market," and the second study entitled, "Distribution of Live Stock in the Chicago
15260 Market," and published—"Distribution of Live Stock in the Chicago Market," 1924 to 1929, published in 1932; a study called "Grain Elevator Storage at the Interior Terminal Markets," which is an article in the Journal of Business of the University of Chicago, published in 1931; a monograph on the grain supply area of the Chicago market, published in July, 1934; two articles in the Journal of Business for October, 1934, and January, 1935; on the distribution—wait a moment—January, 1935, and April, 1935, on the distribution of grain and grain products from the Chicago market; an article in the

Journal of Farm Economics for October, 1934, entitled, "The Competitive Position of the Chicago Market in the Region of Grain Supply." There is another one here. An article in July, 1931, "General Farm Economics," on the, potential supply area of the Chicago market for hogs.

I have a copy of that somewhere, and in the same Journal—well, that title was "Potential Supply Area of the Chicago Live Stock Market." In the same Journal
15261 in October, 1932, an article called, "Potential Supply Areas of Pacific Coast Markets for Hogs." A monograph in February, 1937, "Physical Distribution of Fresh Fruits and Vegetables," and in July, 1938, a monograph, in the same series, "Studies in Business Administration on the Changing Relative Importance of the Central Live Stock Market."

I have conducted studies and made research in the marketing of other agricultural products than the ones on which I have written these monographs or reports. I have published two articles. One on the marketing of eggs, and one on butter, published in the Journal of Business, studying the hedging possibilities in those two commodities, and made a general study, which has not matured in published form, of the fruit and vegetable markets.

My undergraduate education was at Bowdoin College, two years spent at the Harvard Graduate College with a degree of A.M.; from that I went directly into teaching at the Montana State College, for two years; spent
15262 one year at the University of Utah. I started my teaching in English, and continued in that line until I came to Chicago in 1920. I spent an interim of three years of farming in Montana after the year I spent at Utah, in grain farming. I went to teaching at the Montana State College and remained there until 1920 and from that time have been in business school in the University of Chicago. I hold the degrees of A.B. and A.M.

15263 Mr. Wooden: Your Honor, I tender the witness for acceptance at this time as an expert in the field with which he is familiar and subject to such cross examination on that phase of his testimony as Respondents may wish to make at this time.

Mr. Leisure: Well, I don't care to break up his cross-examination in any way.

Trial Examiner Norwood: The witness is accepted as an expert.

Mr. Zimmerman: I don't want it to be understood by not cross-examining now that we are waiving anything whatsoever or agreeing or stipulating to any qualifications that the witness may have.

Trial Examiner Norwood: Go ahead.

By Mr. Wooden:

Q. Dr. Duddy, do you know of any method of marketing or pricing of agricultural products in which all the producers sell only at delivered prices and refuse to
15264 quote prices f.o.b. their shipping points?

Mr. Zimmerman: I object to the question. There is, I presume, an attempt to formulate some sort of a hypothetical question in order that parallels maybe drawn between the assumed fact in the question and the facts shown by the record here.

The facts in the record here don't coincide with the assumptions in the question.

There is no showing here that the Portland Cement is so marketed or offered.

Mr. Zimmerman: Then there would be the further objection that the matter of marketing eggs and butter and other similar agricultural products, including hogs, is not at all similar to the matter of manufacturing and marketing Portland Cement. There is no parallel at all.

15265 Mr. Leisure: I have the additional objection that the question is incompetent, irrelevant, and immaterial and does not prove or tend to prove any of the issues in this case.

A. No.

By Mr. Wooden:

Q. Would you say, based on your experience and study of agricultural marketing, that there is or is not any such practice in the marketing of agricultural products?

Mr. Leisure: May we have the same objection to this line of testimony?

Trial Examiner Norwood: Yes.

15266 Mr. Zimmerman: The objection will stand to the entire line?

Trial Examiner Norwood: Yes, and counsel may have an exception.

A. No, there is not a practice of confining sales to a delivered price basis.

Q. Take the marketing of grain, for instance, to what extent is grain or wheat sold f.o.b. the producer's shipping point?

A. Well, in exact proportions I couldn't answer that question but I would say a considerable amount of it is so sold, though in the Chicago market the typical way of selling grain is on a consignment basis. That is, it is sold after it arrives at the market, at the market price.

Q. Is that sold by the original producer, that your are speaking of, now?

A. It is sold for his account by a commission man.

Q. Is there a method of selling grain known as a "to arrive" basis?

A. Yes, there is such a transaction.

Q. Explain that.

A. A "to arrive" sale which calls for delivery
15267 on track in the terminal within a certain time interval.

This "to arrive" bid originates on the floor of the Board of Trade in the cash grain department.

It originates out of the competitive buying and selling which is going on there.

It indicates a willingness on the part of the buyer to receive grain delivered in the market from a country shipper at an agreed price, this price to cover costs of transportation from the origin point to the market.

Q. How large a proportion of grain is sold in that way?

A. Relatively little as compared with consignment selling.

Q. Speaking of the grain exchanges and your reference to competitive buying and selling, there, how often does the price of grain on the Grain Exchanges change?

A. Oh, it changes constantly during the trading sessions.

Q. Do you mean every few minutes, possibly?

A. Yes; unless the market is very slow, changes of price are within the period of a minute or two minutes.

Q. Have you ever known of any cases in the marketing of grain where the price on the exchanges did not fluctuate at all over a period of some months?

Mr. Leisure: As I understand it, my objection covered this line of testimony?

Trial Examiner Norwood: Yes.

A. Well, of course, during the War period when
15268 the prices were fixed by the Government we had no change in the wheat price, but other than that I know of no period when we get a static price situation in a trading exchange.

Q. What is the longest period you have ever known of it in which prices remained without change on the Exchange?

A. I have no specific knowledge to what extent prices remain the same for any period of time, but all the information I do have indicates that those periods are very short, indeed.

Q. What do you mean by "very short"?

A. For example, in your "to arrive" bid you have a good indication of the degree to which prices are subject to change during the trading session.

A "to arrive" bid to the country made during the hours of trading is good only, by the rules of the Board of Trade, for acceptance within a five minute interval.

Bids made at the close of the market on the basis of the closing price are good until the opening of the market on the following morning but that five-minute interval indicates a dynamic price situation.

Q. Do you know of any agricultural products that are sold on a basing point at point of shipment?

A. No. I do not know of the existence of any basing point plan of selling agricultural products from producing point.

Q. Do you know who pays the freight on ship-
15269 ments of agricultural products?

A. Well, on an f.o.b. sale or on a consignment sale, the freight is paid by the shipper, by the—well, on the f.o.b. shipping point transaction the buyer pays the freight since he takes title at the shipping point.

On the consignment sale or a sale on the "to arrive" price—well, on a consignment sale the shipper in the country pays the freight since it is deducted on the account sales.

The "to arrive" price is quoted to include freight to the terminal.

Q. Are there any agricultural products that are sold and where the producer receives and accepts different prices for the same commodity at the same time, depending on where the commodity is to be delivered?

A. No, not at the same time. The producer typically and always, so far as I know, sells at the price which will yield him the highest net return.

Q. Now, Mr. Duddy, assuming for the purposes of the question that cement is quoted and sold only at delivered prices and that the cement mills or producers do not quote and sell f.o.b. mill; assume that there are some cement mills and groups of cement mills that are basing points and other mills are non-basing points; assume that the delivered prices of cement are the equivalent of basing
15270 point price plus rail freight from the basing point to destination and that non-basing point mills match the delivered prices of the basing point mill; assume further that the lowest combination of the base price plus rail freight determines which basing point price will govern particular destinations and that when delivered prices are made in that way the delivered prices of all mills become identical at the same destination; assume that on shipments of cement the freight is ordinarily paid by the buyer, that it is deducted from the face of the invoice, and that the balance is then paid to the seller; assume also that the mill net prices of each non-basing point mill vary among its respective customers, depending on the differences in freight to their respective destinations, substantially higher mill nets being received from its nearby customers than from its more distant customers; assume further that when selling for delivery at destinations governed by other basing point mills, the mill net prices of each basing point mill also vary between its respective customers, depending on the differences in freight to their respective destinations, substantially higher mill nets being received from some customers in territory governed by it than by some customers in the territory governed by other basing point mills; take all those factors into consideration and then tell us if there is anything like that in the marketing of any agricultural product, that you know of.

15271 Mr. Leisure: If Your Honor pleases, we object to that hypothetical question on the grounds previously stated as to the line of testimony, and, on the additional grounds that the question does not adequately or correctly state the record.

15272 The Witness: Do you mean by basing points, a point at which the price controls, prices at other points?

By Mr. Wooden:

Q. Yes.

A. No, I do not.

Q. You know of no such.

15277 Q. Are you familiar, Doctor Duddy, with the difference between basing point mills and non-bas-
15278 ing point mills in that connection?

A. Well, I have done some reading on the basing point thing. I don't feel that I am an authority on it, but I understand that there are non-basing point mills which sell at—or agree to sell at points for delivery on the basis of the price at the basing point mill, plus freight.

Mr. Wooden: Your Honor, I would like to have the question read, and if the witness says he does not understand it, let him say so. If he understands it, why, all right.

Trial Examiner Norwood: I think he may answer. I will overrule the objections. He may answer the previous question.

A. Well, my answer to the hypothetical question is, that I know of no similar system in the sale of agricultural products.

Mr. Wooden: Mark this the next number, please.

(Thereupon a certain paper, purporting to be a chart, was marked Commission's Exhibit No. 2840, for identification.)

By Mr. Wooden:

Q. I believe you said, Dr. Duddy, that you did not know of any agricultural producer who received different nets at his shipping point at the same time from different customers, different purchasers?

15279 A. That's correct.

Q. (Showing paper to witness.) I am showing you a paper that is marked Commission's Exhibit 2840, for identification, and which purports to be a chart of bids on cement to North Carolina, Division of Purchase and Contract, February 11, 1937, as shown by Commission's Exhibit 12-A, B, C, and 1101-A and B.

Now, assuming that this chart shows, with approximate correctness, the variations between the maximum that would have been received on these bids, say, take the Universal-Atlas, for instance, the various dots there purport to show the variations in cents per barrel, by which the

different destinations resulted in a different mill net, to the Universal-Atlas Company—

Mr. Leisure: May I—

Q. (Resumed) Do you know of any agricultural producer who would, or who has, made prices representing variations to himself at the same time depending upon where the material was to be taken?

15284 Q. Dr. Duddy, do you know of any marketing of any agricultural product where the producer sells at f.o.b. shipping point and nets different amounts from different people at the same time?

A. No, I do not.

Q. I believe you said a while ago that the agricultural producer always sells at the highest price he can get?

A. Yes; he tries to maximize his net return by seeking out the market of highest price relative to his location.

15285 Q. And do you know of any case where the agricultural producer would net different amounts at the same time by shipping his product to different places?

A. No, that is not a typical practice. Assuming that he knows where his markets are or what relative prices in different markets are, he will always choose the market of highest net return.

Q. Dr. Duddy, to what extent have you found in the marketing of agricultural products that shipments are made of the same commodity from one producing section or point, to another?

A. I am not sure that I understand your question unless it means from one producing section to non-producing section of the same commodity.

Q. Yes, that is what I meant.

A. Well, you might have crop failure in one section, as a shortage of a corn crop in a section where corn is typically raised and fed to livestock and you would

15286 certainly have shipments from another corn section into that area to supply that deficit.

Q. But in the absence of abnormal or unusual conditions such as that, what is your answer?

A. Normally you would have a shuttling back and forth of shipments from one surplus producing region to another surplus producing region. Your surpluses would move toward your central markets and away from low

price to high priced markets, the low priced markets being in your surplus region.

15287 By Mr. Wooden:

Q. Did you ever know of agricultural commodities moving away from high return points into low return points?

A. Not typically. Of course, you have got to—you have got to realize that shippers in the country do not have the perfect information about markets and market prices, and, lacking that perfect information they—I suppose they often do sell in a market which pays them less than some other market would pay them; but, if they know what they are doing, they certainly don't choose a market of a lower net return.

Q. (Indicating) I am showing you Commission's Exhibit 2837, being one of the Cement Institute advertisements headed "Wheat and Cement", containing a picture of a boy with a bag of cement on one shoulder and a sheaf of wheat under his arm.

I note in that advertisement the statement: "Hundreds of shipments of wheat of a given grade are sold on the Chicago Grain Market at a uniform delivered price."

Do you find that?

A. You mean in the first paragraph?

Q. Yes.

A. Yes.

Q. Is that statement substantially accurate?

A. Well, it is accurate only insofar as there is an agreement to buy on the delivered price basis.

15288 Q. Such as what type of shipment?

A. On the "to arrive" contract basis, but that is not the typical mode of buying in that market. There may be hundreds of shipments—oh, I doubt that there are hundreds of shipments every day, of wheat which are sold on a "to arrive" basis.

Q. I believe you said before that the "to arrive" method was a comparatively small proportion of the total?

A. Small relative to the consignment sales.

Q. Do you find in paragraph 2 of that exhibit this statement: "Though range of different costs and ship varying distances it is all sold at the prevailing delivered price."

A. Yes.

Q. And: "Though all farmers are keen competitors of

each other their wheat must sell at the uniform going price."

A. Yes.

Q. Does the term "prevailing delivered price" used there mean the same thing to you as uniform going price?

A. No. As I explained before, the delivered price is a contract price; it is an agreement on the part of the buyer to pay a definite price for grain delivered on track in the terminal within a certain time interval; but the uniform going price is the price that is currently prevailing in the market through the buying and selling of people on the
floor of the Board of Trade. Buyers are buying as
15289 cheaply as they can without respect as to where it originates, and sellers whose grain may be sold there are not getting an assured price, they are getting the market price, which changes momentarily in the supply and demand conditions. It is not—the shipper in the country cannot count on f.o.b. plus freight, in the going price, but when he accepts a "to arrive" bid he is assured of a definite return.

Q. Do you, then, draw a considerable distinction between prevailing delivered price and the uniform going price?

A. Yes, I do. One is a price which is agreed upon in advance of delivery by the buyer and seller. The going price is a non-predictable price; it is the price obtaining in the market, currently. It is the competitive pre-determined price which operates to clear the market.

Q. Referring to that same exhibit which you have before you, do you find a statement in paragraph 4: "The lowest price becomes the going price", that is applicable to any standard product?

A. Yes.

Q. Like wheat?

A. "The lowest price becomes the going price" for a product, a uniform product.

Q. What is your opinion as to the truth or accuracy of that statement?

A. Well, in an open competitive market where
15290 buying and selling is going on, freely, that is true. Sellers who are willing to quote lower prices operate to bring other—that is prices of other sellers down to that point, and then the lowest price does become the going price.

15291 Q. You stated that the lowest price became the going price in a market competitively determined. I am asking you whether the statement would be true in a market not so determined?

A. Do you mean where open market competitive bidding does not take place?

Q. Yes.

A. Well, there is this difficulty in the latter type of market, that a buyer who may be quoted a certain price which may be, in fact, the lowest price, that is the lowest in the sense that no lower price is offered, is at a disadvantage in not being able to check such price, as a wheat producer is able to check the price offered to him in a local market by referring to the price at Chicago, for example, which is an open market published price.

Q. You mean that—

A. In that latter type of market, the buyer is not in a position to verify the fact that there may be a lower price available to it.

15292 By Mr. Wooden:

Q. Is the mere fact that a given price is the lowest price available any evidence as to whether or not it is competitively arrived at?

A. No, I don't believe the lowness of a price or the highness of a price is, in itself, evidence of a competition—of the existence of competition. I think it depends on how that lowest or highest price is arrived at. It is the type of negotiation by which the price is determined which is important from a competitive standpoint.

15294 Q. Dr. Duddy, referring to your testimony this morning that the agricultural producers sell their products only where it gives them the highest available net return, have you made any studies, or published any studies, illustrating that proposition?

A. Yes, some of those studies I referred to this morning are of that nature, and I can—

15295 Q. Will you state which ones they are?

A. I can illustrate those with my charts which are available.

15297 Q. What do you know about the preparation of those papers, by whom were they prepared, and when, and in what connection?

A. 2844 is an exhibit from an article prepared and published by me.

A. (Resumed) This Exhibit 2844 is a map, a reproduction of a map. It is part of an article prepared and published by myself in the Journal of Farm Economics for July, 1931, and the title of the article is "The Potential Supply Area of the Chicago Live Stock Market."

(Referring to paper) This is an article with an accompanying chart—

By Mr. Wooden:

Q. To what number do you refer?

A. Exhibit 2841, and the chart is numbered—two of them—2842, and 2843, the charts being duplicates, are part of an article entitled: "Potential Supply Areas of Pacific Coast Markets for Hogs," being prepared by E. A. Duddy and David Revzan, David Revzan, a research assistant at the School of Business at the University of Chicago, assigned to me for this work,—and published in the Journal of Farm Economics for October, 1932.

15298 (Referring to paper) And this is—Exhibit 2844—a reproduction of a chart from an article published in the April, 1935, Journal of Business of the University of Chicago by Charles T. Battin,—the article entitled "The Competitive Position of the Chicago Potato Market."

15299 Q. What did you have to do with that study?

A. Battin was a graduate student who worked under my supervision in writing his Doctor's thesis on this subject. Other than supervision I had nothing to do with it.

Q. Can you vouch for the accuracy and correctness of that publication?

Mr. Zimmerman: I object to the question.

A. Of the latter publication?

Q. Yes.

The Witness: To this extent: that the manuscript from which the article was taken was reviewed by a faculty committee of which I was a member and was accepted as competent for compliance with the thesis requirements for the Ph.D. degree.

By Mr. Wooden:

Q. Now, Professor Duddy, will you elaborate on
15300 your testimony of this morning to the effect that agricultural producers always sell in the area that gives them the highest net return, by reference to any of these studies and charts that you have there?

15301 *Voir Dire Examination by Mr. Leisure.*

Q. Doctor, on this large map, 2844, from what basic data is the material, the graph material for trade thereon, taken?

A. The prices are prices published by the Division of Crop and Live Stock Estimates of the Bureau of Agricultural Economics.

Q. Of the United States Government?

A. United States Department of Agriculture.

Q. And having gathered that data or having had it gathered for you, you wrote the article that you have described, is that correct, and you also—

A. We took the price quotations from mimeographed publications of the Bureau of Agricultural Economics.

Q. And having assembled those, as you stated, then you wrote the article which you told us about a moment ago?

A. That is correct.

Q. And to have a graph made, someone prepared for you or you prepared a map which you included in the article? Is the map in the article?

A. This is a copy of the map in the article.

Q. That is in the article?

15302 A. Yes, that is in the article.

Q. And who prepared the map for you?

A. My research assistant, David Revzan.

Q. May we see the article? Is the article included here, Doctor, in one of these exhibits?

A. No, it is not. I do not have an extra copy of the article, but it is in this book.

Q. May I just glance at it?

A. Yes. (Handing a book to Mr. Leisure.)

Q. The graph you refer to is the one that appears on 416, is that correct, Doctor?

A. That is correct, it is identical with this.

Q. Yes. Now, as to Exhibit 2845: that was used in another article, was it, in the same manner?

A. That is in the article referred to.

Q. In this booklet, here?

A. No; in this.

Q. This is the one the graduate student helped you with and wrote a thesis; at the same time?

A. It is in this (handing a pamphlet to Mr. Leisure).

Q. I incorrectly stated that. You did not testify that a graduate student helped you. You said he wrote a thesis on this.

A. That is his own work.

Off the record.

15303 Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Leisure:

Q. The graduate student, then, included this map, having drafted it or had someone draft it for him in the article which appears in "The Journal of Business of the University of Chicago"?

A. That is right.

Q. April, 1935?

A. Yes.

Mr. MacIntyre: Mr. Leisure, may I inquire when you say "this map" as to what exhibit number it carries?

Mr. Leisure: I started out by saying this Exhibit 2845.

The Witness: Correct.

By Mr. Leisure:

Q. And Exhibit 2841 is a pamphlet or booklet or article written by yourself, Doctor, and Mr. David Revzan, R-e-v-z-a-n, concerning "Potential Supply Areas of Pacific Coast Markets for Hogs"?

A. Correct.

Q. I notice on page 588 there have been some pencil changes. Are those your writing, Doctor? (Indicating to the witness.)

15304 A. That is my writing, yes.

15309 Q. Well, Dr. Duddy, I will ask you if you will state the basis for your testimony to the effect that agricultural producers sell only in the markets that give them the highest net return.

A. Well, my basis for that conclusion largely rests upon these studies which—the evidence of which lies before you.

What we did there was to set up these market prices in central live stock markets and compare them, one with the other, on the basis of monthly averages, and annual averages, to determine what the average difference in price for an identical product was.

For example, the hog studies are based on 250
15310 pound hogs, and the prices are the top prices paid in the respective markets.

Now, having established a difference in those market prices, we converted that difference into a distance factor by carrying the price difference into the freight rate schedules, and determining points on railroads in territory intervening, or either side of these markets, which would equalize in terms of freight cost the price differences existing between the markets, so that differences in prices at that point were balanced by differences in cost of transportation to the respective markets.

In the live stock study, we had to take account of shrinkage in transit as a cost of marketing. We used figures from the Armour Live Stock Bureau, and from the Port of the Trade Commission on the meat packing industry as a guide to figuring the amount of shrinkage in transit on a distance basis, and we figured the cost of shrinkage from that point which we had established between the markets into the respective markets at the prices prevailing in each market, to get a differential shrinkage cost.

Then we applied that differential shrinkage cost in favor of the market with the lowest shrinkage cost to carry the point farther along the railroad in the direction of the market at a greater distance from that point, that
15311 is, we used the shrinkage cost factor as a correction factor for our original calculation.

In the study of the potential market area for Chicago, for hogs, we repeated that comparison of prices for the following pairs of markets: Chicago vs. East St. Louis; Chicago vs. Kansas City; Chicago vs. Omaha; Chicago vs. Sioux City; Chicago vs. St. Paul, and by establishing a succession of points by means of this method we were able to draw a line which expressed, for us, the limits of potential competition of Chicago in that area for hogs when in competition with these other markets.

15313 Mr. Leisure: One moment, Doctor. Your Honor, I would rather if the Doctor can testify without referring to the map.

Trial Examiner Norwood: Yes, do not disclose anything in this paper that has not been received in evidence.

Mr. Leisure: If he will just tell us what he did.

The Witness: All right.

Trial Examiner Norwood: But give us that data and give us your conclusions that you arrive at.

The Witness: All right.

A. (Answer resumed) Having established this line of indifference, and zones of indifference, with respect to the other markets—

Q. What do you mean by lines and zones of indifference?

A. I mean points within a zone, or points along the line between two markets at which the net returns to shippers from those points are the same irrespective of to which market they ship.

15314 Mr. Zimmerman: May I interject a question to get that clear in my mind?

Trial Examiner Norwood: Yes.

Mr. Zimmerman: Do you mean by that where you have a location that was freight-wise midway between two markets?

The Witness: No.

Mr. Zimmerman: Or centers?

The Witness: It takes account not only of differences in freight, but differences in prices, the difference in price being balanced off against the difference in cost of reaching the market, so that you have a geographical margin between these competing markets.

Mr. Zimmerman: Thank you very much.

15315 Q. You mean that in certain areas tributary to certain destinations the shippers in that area would ship to that destination because it paid them the highest net return?

A. I wasn't paying attention. I beg your pardon.

The Witness: Would you read the question?

Trial Examiner Norwood: Read that.

(Last question read.)

A. Yes. This line of indifference or zone of indifference gave us a base line from which to determine the areas within which shippers would normally seek to sell at a given market in order to maximize their net returns.

By Mr. Wooden:

15320 Q. Doctor, referring to Exhibit 2837. Do you find that— Do you find in that a statement reading: "Uniform Portland cement prices in any town are as logical and inevitable as uniform wheat prices at the Chicago Grain Market. The cement business is as highly competi-

tive as the grain business. The falling cement price curve from 1920 to 1932 is evidence of this."

Do you find that?

A. In the last paragraph, yes.

Q. Will you state whether, in your opinion, that is a fair comparison between cement and wheat or grain?

A. The statement seems to me open to question
15321 inasmuch as there is a difference in the logic be-
hind a uniform wheat price at the Chicago Grain Market and a uniform delivered price for cement, as I understand the way in which that uniform price is quoted.

The uniform price at the Chicago Grain Market is what I called this morning a going price for wheat determined by the active buying and selling on a trading floor of a price which is momentarily changing and a price which is not predictable from one period of time to another because of the different interpretations placed upon supply and demand factors by the operators in the market.

Now, the logic, so far as I am informed, behind the establishment of a uniform delivered price for cement is the reasoning behind a delivered price, which to me, means a contract price, an agreed price, and a price which once agreed upon is certain and predictable so far as the buyer is concerned and seller—

Mr. Zimmerman: May I interject? You mean agreed upon between the buyer and seller, don't you, Doctor?

The Witness: Yes; agreed upon between the buyer and seller.

A. (Continuing) —but it is further my understanding that from these advertisements as I have read them that no different price is available than this delivered price
quoted, since that purports to be the lowest avail-
15322 able price and, therefore, it seems to me that the uniform portland cement price in any town which is a delivered price to which all bidders immediately adjust themselves, is more or less predictable once a single seller has made a price quotation.

By Mr. Wooden:

Q. Suppose the buyer at a particular point finds that all sellers are making only one offer to sell at a single identical delivered price and there aren't any alternatives offered; would you class that as a going price in the event that you used that term with regard to wheat?

A. No, I would say the buyer is in a much different bar-

gaining position where he has a single price offered to him at a given point. He is in a much different bargaining position and he has much less bargaining power than a buyer in a market at which many bids are made and a dynamic price situation exists.

Q. Do you see wherein the cement buyer might help himself by staying out of the market like a seller of wheat, in the hope of getting a better price?

A. Well, that would depend upon the frequency with which the price of cement changed at that point and I know that the price of grain which is in both an up and down direction and sellers and buyers do hold off the market in order to get in a more strategic position.

15323 I do not know exactly the extent to which frequency of change is a characteristic of delivered cement prices.

Q. If the seller of a staple agricultural commodity like wheat wished to make a concession in price how would he do it?

A. A seller?

Q. Yes.

A. Well, he would lower his offering price.

Q. To all?

A. To all buyers, yes. He would lower his offering price and that offering price would immediately become effective to any buyer in the market.

Q. Would he make the same net return, no matter to whom the offer was made, or by whom accepted?

A. Yes.

Q. Now, referring to Commission's Exhibit 2836, referring you to the last paragraph; do you find there a statement to the effect that "under the old system of selling cement there were only as many competitive points as there were mills"?

A. That is right.

Q. Do you find also a statement in the same paragraph: "Now every village, town and city is a point of competition"?

A. That is correct.

Q. Does "competition" as used in those two statements in that some paragraph mean the same thing to you?

15324 A. Well, obviously in the first statement reading: "Under the old system there were only as many competitive points as there were mills", the

competition in selling was based on the mill price; the price of competing sellers which I would liken to the going market price of sellers of wheat at shipping points.

In the second statement reading: "Now every village, town and city is a point of competition", the competition is obviously on the basis of delivered prices and so far as my information extends as to the way in which that delivered price is arrived at, it means only a single price quotation to which all other sellers adjust themselves irrespective of location.

It seems to me quite a different thing than the competition on a mill base price method.

Q. Now, showing you Exhibit 2838, do you find there the statement: "In nearly every instance all cement plants seeking business in a given town are located varying distances from it and pay varying freight charges,—" and for that reason "—each plant is actually getting a different amount at its mill door even though its price in the market is the same as others. This is competition."

Do you find that statement?

A. Yes.

Q. So far as your knowledge of competitive conditions in the field of agricultural products is concerned,

15325 is that competition in that sense?

A. Well, agriculture shippers who are varying distance from a base market, from a market in which

15326 they are going to sell, get different nets according to their respective locations.

15327 Q. Well, does the mere fact that different producers get different net returns, have anything to do with the question of whether it is competition or not?

A. Well, I think that difference in net return is not in itself an evidence of competition. If we take the case of a line elevator company, for example, which is quoting prices at elevators—at its elevators in the country, along a right-of-way, it may quote prices at those points which reflect the differences in distance between them, but the price which was originally determined, that is, by the elevator, may not reflect a central market price less freight cost to that original point from which the differences in price for the other points are determined. That is, unless competition was active in determining that original price, such as the elevator has offered to pay, then differ-

ences based upon that do not necessarily indicate
15328 competition.

Q. (Indicating) Showing you Commission's Exhibit 2839 entitled: "The Same Economic Law." Do you find there a similar statement to the one you have just been discussing in the other exhibit?

A. I find a—in the next to the last paragraph a somewhat similar statement reading as follows: "Though prices for any given grade of wheat are uniform, wheat farmers living varying distances from any market, and having varying costs, net different amounts on their wheat."

Q. And the next?

A. "Since nearly all cement plants are located varying distances from any market, they likewise net different amounts on their cement." "This in both instances is competition."

Q. Is that a fair analogy between the cement and the agricultural products market?

A. Well, so far as I understand the two systems, I think it is a fair analogy to the extent that cement plants confine their selling to the territory in which the basing point price is controlling, to the extent that they sell to points outside of that territory, taking a less than a maximum net return, they are selling in a manner unlike the seller of wheat who is always trying to maximize his net return.

15329 Q. Do you find in that same exhibit a statement to the effect that what is true of corn, and barley, and hogs, is also true of cement, namely, that daily uniform prices are established at which exchanges take place?

A. Yes, I see the statement: "Daily uniform prices for any market grade of corn, barley, hogs, and countless other products are established by the same economic law."

15333 The Witness: The question was what was the condition of agricultural prices in July, 1932?

Mr. Zimmerman: Yes, and he has answered that.

The Witness: They were depressed.

Mr. Zimmerman: Yes.

By Mr. Wooden:

Q. Was the trend downward or upward at that time?

A. The trend, as I recall, was still down.

Q. And continued down for some time after that,—after 1932?

A. Yes, and into 1933.

Q. Judged by any standard of competition that you are familiar with in the marketing of agricultural commodities, is the method of pricing of cement, as it has been described to you today, by me, in my questions, a competitive
15334 method of ascertaining cement prices?
15338 Trial Examiner Norwood: I will overrule counsel's objection and ask the witness to complete the answer.

A. (Continuing) As a partial answer to the question, I would say that the distinction between the competitive system which obtains in the marketing of an agricultural product and the marketing of cement on a delivered price basis is the position of the buyer in the two cases.

The buyer in the case of the agricultural product
15339 seems to have much more bargaining power, much more ability to affect a modification of the seller's quotation than is the buyer at a destination point who is offered a delivered price by a cement plant. His alternatives seem to me not to be comparable in bargaining power with those of the buyer in the wheat market.

Trial Examiner Norwood: Could you say the same as to marketing any product, if it is done by the same system?

Mr. Leisure: What system, if you please, your Honor?

Trial Examiner Norwood: That we have been discussing, here; the basing point system.

The Witness: I would say yes. May I add to my answer that I recognize there are other forms of competition than price competition. What I have been talking about in the answer is price competition.

Cross-Examination by Mr. Leisure.

Q. Doctor Duddy, most of your publications and study in the economic field, as I understood you this morning, have had to do largely with agricultural products?

A. That is correct.

15340 Q. Now, do not economists recognize that the marketing of agricultural products and the marketing of manufactured goods present entirely different problems?

A. The problems—certain problems do appear in some of these products which do not appear in others due to the difference in the nature of the product.

Q. There are, as you said, many different problems, however?

A. Yes, as between different commodities there are problems which grow out mostly of the nature of the commodity.

15341 Q. Now, it is true, isn't it, that the problem of production, for instance, in agriculture, is very different from the problem of production in manufacturing?

A. Yes, if you want to emphasize differences.

The influence of weather, the fact that you have natural factors controlling agricultural products to an extent to which natural factors do not apply to manufactured goods, yes. There is a marked difference there.

Q. And what else? What other would you point out?

A. Well, I suppose there are some differences with respect to the geographic scatter of production in the one case as in the other and perhaps differences in the relation of production to surplus production to points of deficit.

15342 Q. What other difference suggests itself to your mind, Doctor?

A. Well, in the marketing process you have rather highly organized trading exchanges for the staple agricultural commodities which you do not have for many of the manufactured goods due to their lack of uniformity.

15344 Q. Suppose we start with the producer of wheat, the farmer who produces the wheat.

A. Well, his first market is a local assembly point at which he may either sell his wheat to a local elevator at the point, taking cash, or he can engage the services of the elevator as a selling agent to sell his wheat in the terminal market or he can sell to a local mill, if one is there, or he can sell to a broker who represents a terminal market buyer and sell on a terminal market price basis to a terminal market commission firm or he may
15345 consign the grain himself to a terminal market and have it sold to his account on a consignment basis or he may accept one of these "to arrive" bids, to deliver on track in the terminal. He has a great many options of selling, at that local market.

Of course, once the grain reaches the market, it is offered for sale on the floor of the trading exchange, typically.

Q. Up to the time before we get to the exchange, up to the time that you have been describing already, is the wheat still at the farm?

A. Actually, what happens when the farmer gets ready to sell his wheat, is that he takes a sample—if his wheat is in shocks in the field, he threshes out a sample of that wheat and takes it to town and negotiates a sale on the basis of that sample, if he wants to sell from the machine at the time the wheat is harvested, is threshed.

15346 If, on the other hand, he has storage on his farm, he may store it in a bin, or store it in the local elevator, and hold it for future sale, but he gets offers on the basis of the sample that he submits, and then delivers the wheat accordingly to the buyer, or, if he decides to sell in the terminal, he sends his sample to the market at Chicago, or at Minneapolis.

By Mr. Leisure:

Q. Now, when he takes the sample to the local grain elevator, as you describe, as a general principle, or as a general rule, does he have opportunity to shop around between several grain elevators, or does he take it to a grain elevator in the town?

A. Well, generally—depending on circumstances at different points, of course—he has a chance to shop around.

15350 Q. Doctor, in the case of the agricultural products you have, do you not, a very large number of producers, that is one difference from a number of manufacturers, that is another difference, is it not?

A. Yes, I suppose that could be alleged of the staple agricultural products.

15351 Q. There is a term which you economists use describing that, as atomistic competition,—where you have a great number of producers, isn't that so, where you have a myriad of sellers?

A. Yes, yes, where you have a large number of sellers acting independently, you do have what the economists describe as atomistic competition. I think that is rather ideal language to use to describe that situation, however, because as I said earlier, you do have buyers in all of these local markets, in the territory tributary to Chicago, watching the Chicago price, and being guided in their operations by that, and not acting as individual sellers, they

operate entirely on an independent judgment of
15352 their own as to what the market price should be.

Q. Whereas, with the manufacturers, you have a comparatively small group of sellers?

A. Comparatively, yes.

Q. As a matter of fact, the factory system, with quantity production, has tended to give us smaller number of sellers, is that not true, in each industry?

A. Well, I would not say that it is quantity production alone that has given us the smaller number of sellers.

Q. Well, the factory system has given it to us, or, at least, has been one element in contributing to it?

A. Well, yes, the trend in the size of the business units has been toward a larger unit.

Trial Examiner Norwood: What is the cause of that?

The Witness: Well, I suppose with machine production certain economies are attributable to size, which were not present when handicraft system was in vogue, and that producers have tried to enlarge their units as they come to achieve those economies in production.